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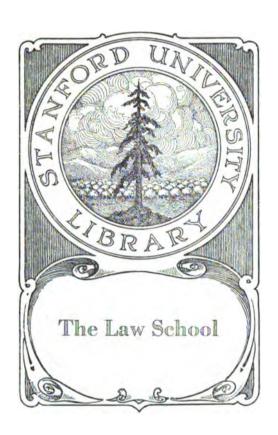
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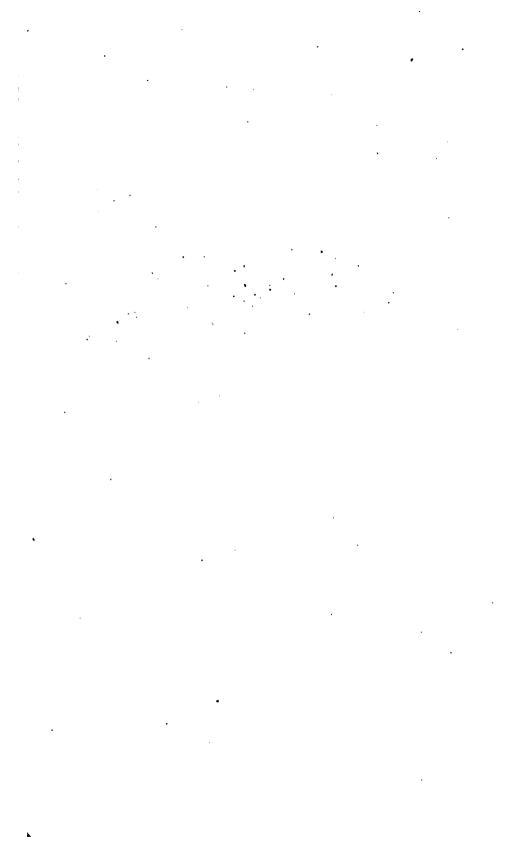
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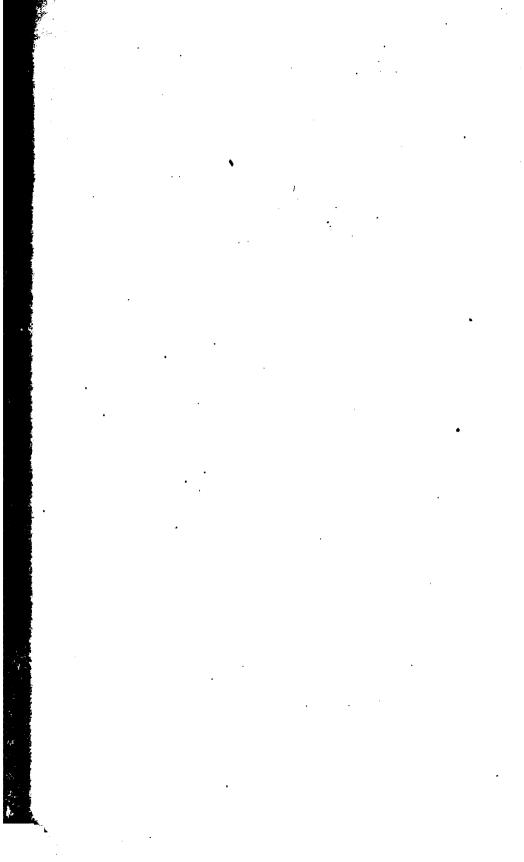








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## REPORTS

OF

## CASES DECIDED

BY THE

# ENGLISH COURTS,

WITH

# NOTES AND REFERENCES TO KINDRED CASES AND AUTHORITIES.

BY

NATHANIEL C. MOAK,
Counsellor at Law.

VOLUME XXV.

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- 7 CHANCERY DIVISION, pp. 778-876.
- 8 CHANCERY DIVISION, pp. 1-825.
- 9 CHANCERY DIVISION, pp. 1-158.

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## JUDGES.

### LORD HIGH-CHANCELLOR.

Right Hon. LORD CAIRNS, appointed 1874. Right Hon. LORD SELBORNE, "1880.

## LORDS OF APPEAL IN ORDINARY.

Right Hon. LORD BLACKBURN, appointed 1876. Right Hon. LORD GORDON, Right Hon. WILLIAM WATSON, 4 1880.

## PRIVY COUNCIL, JUDICIAL COMMITTEE.

Right Hon. Sir James W. Colvile. Right Hon. Sir Barnes Pracock. Right Hon. Sir Montague E. Smith. Appointed under 84 & 35 Vict. ch. 91: usually sitting. Right Hon. Sir ROBERT P. COLLIER.

### SUPREME COURT OF JUDICATURE.

#### COURT OF APPEAL.

#### Ex officio Members.

The Right Hon. the LORD HIGH CHANCELLOR (President). The Right Hon. the LORD CHIEF JUSTICE of England. The Right Hon. the MASTER OF THE ROLLS.
The Right Hon. the LORD CHIEF JUSTICE of the Common Pleas.
The Right Hon. the LORD CHIEF BARON of the Exchequer.

## Ordinary Members.

Right Hon. Si	r William Milbourne James,	appointed	1870.
Right Hon. Si	r George Mellish,5	"	"
Right Hon. Si	r RICHARD BAGGALLAY,	•	1875.
Right Hon. Si	r George Wm. W. Bramwell,	**	1876.
Right Hon. Si	r William Baliol Brett,	**	".
	RICHARD PAUL AMPHLETT,6	"	"
	r Henry Cotton,1	"	1877.
	r ALFRED HENRY THESIGER.8	"	"

- Retired with Earl of Beaconsfield's administration, April, 1880: 15 L. J., 227.
- Appointed under Gladstone's administration, April, 1880: 15 L. J., 227.
- Died August 21, 1879: 15 L. J., 115.
- Appointed to fill vacancy of Lord Gordon, April, 1880: 15 L. J., 115, 284.
  Died June 16, 1877: 12 Law Jour., 372.
  Retired on account of ill health October, 1877: 63 L. T., 417.

- Appointed June, 1877, in place of Lord Justice Mellish: 12 Law Jour., 386.
   Appointed Nov., 1877, in place of Lord Justice Amphlett: 12 Law Jour., 681.
   Died October 20, 1880: 15 L. J., 507, 508, 518, 527; 69 L. T., 419, 433.

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#### CHANCERY DIVISION.

Right Hon, the LORD HIGH CHANCELLOR (President).				
Right Hon. Sir George Jessel, Master of the Rolls, appointed 1873				
Hon. Sir RICHARD MALINS, Vice-Chancellor,	"	1866.		
Hon. Sir James Bacon, ""	"	1870.		
Hon. Sir Charles Hall, ""	"	1873.		
Hon. Sir Edward Fry, Justice of the High Court,1	"	1877.		

### QUEEN'S BENCH DIVISION.

Right Hon. Sir ALEXANDER JAMES EDMUND COCKBURN, Bart., G.C.B.				
Lord Chief Justice of England, a	ppointed 1859.			
Hon. Sir John Mellor.	appointed	1861.		
Hon, Sir Robert Lush.	"	1865.		
Hon, Sir WILLIAM FIELD,	"	1875.		
Hon. Sir HENRY MANISTY,	"	1876.		
Hon. Sir Charles Synge Christopher	Bowen, <sup>a</sup> "	1879.		

#### COMMON PLEAS DIVISION.

Right Hon. LORD COLERIDGE, Lord Chief Justice of the Common Pleas, appointed 1873.

Hon.	Sir William Robert Grove,	appointed	1871.
Hon.	GEORGE DENMAN,	•• "	1872.
Hon.	Sir Nathaniel Lindley,	"	1875.
Hon.	Sir HENRY CHARLES LOPES.	"	1876.

#### EXCHEQUER DIVISION.

Right	Hon.	Sir	FITZ-ROY KELLY,4 Lord Chief	Baron, app	ointed	1866.
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## PROBATE, MATRIMONIAL, DIVORCE AND ADMIRALTY DIVISION.

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## JUDGE OF THE COURT OF ARCHES.

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- Appointed April 30, under the act of April 24, 1877: 12 Law Jour., 251.

- Appointed April 30, under the act of April 24, 1877: 12 Law Jour., 251.
  Resigned June 11, 1879: 14 Law Journal, 365; 67 Law Times, 127.
  Appointed June 11, 1879: 14 Law Journal, 365; 67 Law Times, 127.
  Died Sept. 18, 1880: 15 Law Jour., 459; 69 Law Times, 359, 367.
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DETERMINED BY THE

## CHANCERY

OF THE

## HIGH COURT OF JUSTICE,

AND BY THE

## CHIEF JUDGE IN BANKRUPTCY,

AND BY THE

## COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

## LUNACY.

[7 Chancery Division, 778.] V.C.B., Jan. 25, 1878.

\*London and Provincial Bank v. Bogle. [773 [1876 L. 219.]

Judgment Debt-Married Woman-Debt incurred before Marriage-Separate Estate-Restraint on Anticipation-Married Women's Property Act, 1870 (88 & 84 Vict. c. 98), s. 12-Married Women's Property Amendment Act, 1874 (37 & 38 Vict. c. 50), s. 3-Costs of Husband's successful Defence added to Debt.

In an action against a married woman and her husband for a debt contracted by the wife previously to her marriage, judgment was entered against the wife for principal, interest, and costs, but in favor of the husband with costs under the provisions of the Married Women's Property Act, 1870, and the Amendment Act, 1874. The wife's property having been settled on her marriage for her separate use without power of anticipation, the plaintiffs commenced an action in the Chancery Division, for the purpose of enforcing the judgment obtained by them against the wife, and further, to be allowed to add to this the costs they had had to pay the husband:

Held, that, notwithstanding the restraint against anticipation, the plaintiffs were entitled to recover against the separate estate of the wife the amount of their judgment

debt and costs, as well as the costs paid to the husband, which might be added to their original debt.

London and Provinced Bank v. Bogle.

V.C.B.

Action for payment of a judgment debt, and certain costs, out of the separate estate of the defendant Clara Bogle.

In March, 1875, Mrs. Bogle, who was then unmarried, executed four joint and several promissory notes in favor of the plaintiffs for four sums, amounting in all to £678 12s. 11d., and payable at three, six, nine, and twelve months after date. In April following Mr. and Mrs. Bogle were married, and by an ante-nuptial settlement all her property, which consisted of more than £10,000, invested in valuable securities in the United States, was assigned to trustees upon trust to pay the income to her during her life for her separate use without power of anticipation, with ultimate trusts after her death in favor of the husband for life and the issue of the marriage. Some furniture, plate, china, and other articles were vested in the trustees for Mrs. Bogle's separate use, and the settlement also contained a power, at the joint request of Mrs. Bogle and her husband, to raise and pay her,

on her sole receipt, the sum of £1,000.

In March, 1876, the amounts due on the notes being still 774] \*unpaid, the plaintiffs commenced four several actions in the Queen's Bench Division against Mr. and Mrs. Bogle to enforce the payment of the principal and interest thereby To these actions (which were afterwards consolidated) the husband pleaded the Married Women's Property Act, 1870, s. 12, and the Married Women's Property Amendment Act, 1874, s. 3, alleging that he had not and never had at the time or since his marriage any assets in respect of which he, under the provisions of these acts, was liable for his wife's debts contracted before marriage. At the trial of the action at the Swansea Assizes, judgment was entered for the husband with costs, but against the wife, for £705 5s. 7d., the amount due for principal and interest, and £158 6s. 9d. for costs. The whole of Mrs. Bogle's property being included in the settlement, the present proceedings were instituted by the plaintiffs against Mr. and Mrs. Bogle and the trustees of the settlement to obtain payment of the said sums of £707 5s. 7d. and £158 6s. 9d. (amounting to £863 12s. 4d.), and for the further sum of £65 9s. 1d. for the costs they had paid Mr. Bogle in the action in the Queen's Bench Division.

It was alleged that the power of raising £1,000 had been exercised, and the money paid to Mrs. Bogle. The questions now raised were whether sect. 12 of the Married Women's Property Act, 1870('), extended to property settled to the

<sup>(1)</sup> Sect. 12. "A husband shall not by place after this act has come into operareason of any marriage which shall take tion be liable for the debts of his wife

London and Provincial Bank v. Bogle.

1878

separate use of a married woman without power of anticipa-And also whether the husband's costs paid in pursuance of the Amendment Act, 1874, s. 3(1), could be added to the original debt and recovered out of the wife's separate estate.

The statement of defence alleged that Mrs. Bogle had no knowledge of these promissory notes before the marriage, and that the restraint on anticipation was inserted in the settlement in pursuance of an express stipulation on the treaty for the marriage.

\*Sir H. Jackson, Q.C., and C. Clement Berkeley, for the plaintiffs: A married woman who has incurred liabilities before her marriage, cannot take her property out of the power of her creditors by settling it upon herself for her separate use without power of anticipation: neither on principle, Higinbotham v. Holme ('); nor on authority, Sanger

v. Sanger ('); Seton on Decrees (').

We are clearly entitled to recover the judgment debt and costs out of Mrs. Bogle's separate estate, and further, to recover the amount we have had to pay the husband for his costs, which were costs incurred in enforcing our security. Under the Amendment Act, 1874, we were obliged to sue the husband jointly with the wife, and under sect. 3 to pay the costs of his successful defence. We are also entitled to the costs of these present proceedings.

They also referred to Chubb v. Stretch (\*) and Biscoe v.

Kennedy (\*).]

Jason Smith, for Mrs. Bogle: Though the notes were given before marriage, yet judgment was entered up after the marriage, and the original debt being merged in the judgment, In re European Central Railway Company ('), there is no debt contracted before marriage. The case of Sanger v. Sanger is clearly different from the present case, because here it is part of the contract entered into for the benefit of the husband as well as of the wife that anticipation should be restrained, whereas in Sanger v. Sanger there was no such contract, the restraint on anticipation being imposed by a third person. The husband's costs cannot be allowed, for the plaintiffs might have accepted the husband's plea at once,

shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continued unmarried."

(1) Sect. 8. "If it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defence, what-

contracted before marriage, but the wife ever the result of the action may be against the wife."

<sup>9</sup>) 19 Ves., 88.

(\*) Law Rep., 11 Eq., 470.

(4) 4th ed., p. 465. (5) Law Rep., 9 Eq., 555. (6) 1 Bro. C. C., 17 n.

(1) 4 Ch. D., 88; 19 Eng. R., 642,

V.C.B.

and so have avoided them. Under any circumstances, I submit that the debt and costs should come out of the corpus and not out of the income.

John Chester, for the trustees of the settlement, was not called on as to payment of the debt and costs out of the

corpus.

\*BACON, V.C.: This is clearly a debt contracted by 7761 the wife before her marriage, within the words of sect. 12 of the Married Women's Property Act, 1870, and therefore a debt for which her separate estate is liable. What is her separate estate? Clearly it is her right to receive the income of her settled property, as well as the furniture, plate, and other articles which the trustees hold for her separate use, and that £1,000 (if it has not been already raised) payable to her under the power in the settlement. As to the costs in the common law action which have been paid to the husband by the plaintiffs, these were solely occasioned by the unrighteous conduct of the wife in resisting this claim; the plaintiffs were obliged to make the husband a party; how otherwise were they to know that the husband had no assets in respect of which he could be made liable for his wife's debts contracted before marriage? They were not bound to accept his plea without investigation. The plaintiffs as creditors are entitled to all the necessary costs they have been put to in enforcing their claim. I therefore think that they are entitled to add the costs of the husband's successful defence to their debt. There must be a declaration, as asked for by Sir H. Jackson, that the plaintiffs are entitled to recover against the separate estate of Mrs. Bogle included in the settlement, notwithstanding the restraint on anticipation, the amount of their judgment debt and costs, and also the amount of the costs paid by them to Mr. Bogle in the previous action. There will also be an inquiry what property is held upon trust for the separate use of Mrs. Bogle, with a direction to the trustees out of such estate, as and when received, to pay the said judgment debt and costs, husband's costs, and the costs of this action. The trustees' costs must be paid by the plaintiffs, and added to their debt and costs.

Solicitors for plaintiffs: Smith, Davies & Co., agents for Thomas Henry Ensor, Cardiff.

Solicitors for defendants: R. S. Taylor & Sons.

Since the statutes giving married that upon an indebtedness contracted women the control of their property, it by the wife before marriage, the hushas been provided in New York, and band shall only be liable for the amount some of the other states, by statute, of the separate property of the wife, V.C.H.

Dake of Northumberland v. Todd.

1878

or any portion thereof, acquired by him by any ante-nuptial contract or otherwise: Laws N. Y. 1853, p. 1057, 4 Edm. St., 514.

Under this statute the husband and wife may be sued jointly; but the execution on any judgment in such action shall issue against, and such judgment shall bind, the separate estate and property of the wife only, and not that of the husband: Lennox v. Eldred, 65 Barb., 410; Foote v. Morris, 12 N. Y. Leg. Obs., 61; Cannon v. Grantham,45 Miss., 89.And the judgment should be special,

pursuing the language of the statute. It should adjudge the recovery out of the separate estate and property of the wife only, and not that of the husband: Foote v. Morris, 12 N. Y. Leg. Obs., 61, 62; Cannon v. Grantham. 45 Miss., 94.

For forms of complaints in such cases

see 1 Abb. Forms, 143-4.

[7 Chancery Division, 777.] V.C.H., Jan. 29; Feb. 6, 1878.

\*Duke of Northumberland v. Todd.

**[777** 

[1876 N. 124.]

Practice-Plaintiff's Local Solicitor, Affidavit sworn before.

In an action in the Chancery Division, the plaintiff's London solicitors, who were his only solicitors on the record, employed a firm who were his country solicitors in getting up evidence. This business was done entirely by one of the partners in the country firm, but some of the affidavits filed on behalf of the plaintiff were sworn before the other partner:

Held, that such affidavits were inadmissible.

This was an action to restrain the defendant from continuing in the possession or occupation of a farm in Northumberland, or of the crops thereon, and from allowing his stock to remain on the farm, or to consume the crops, and for damages.

During the hearing of the action a question arose as to the admissibility of certain affidavits filed on behalf of the plain-

tiff under the following circumstances:-

Messrs. Bell & Steward, the plaintiff's private solicitors in London, were his only solicitors on the record. Leadbitter & Harvey, of Newcastle-on-Tyne, were the plaintiff's local solicitors in Northumberland. The latter firm were employed in getting up the country evidence for the solicitors in the action, and in conducting such matters connected therewith as required local attention, but Mr. Harvey alone had the charge of this business, and he had made certain affidavits in support of the plaintiff's case. Mr. Leadbitter, the other member of the firm, had nothing whatever to do with the action, except that he had made an affidavit therein verifying an exhibit. Several of the affidavits filed on behalf of the plaintiff, including one by Robert Muckle, his land agent, and one by Mr. Harvey, had, however, been

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sworn before Mr. Leadbitter, who was a commissioner to

administer oaths in the High Court of Justice.

W. Pearson, Q.C., and W. Griffith, for the defendant: The affidavits sworn before Mr. Leadbitter are inadmissible. 778] \*He is a member of the firm who are the Duke's country solicitors, and who probably prepared the affidavits so sworn. The principle is that the commissioner must be perfectly unbiassed, and must not be a person who is The rule is not acquainted with all the facts of the case. confined to the solicitor on the record, but extends to his clerk or agent: Wood v. Harpur (1); Hopkin v. Hopkin ('); In re Gregg ('); Foster v. Harvey (') ('); Morg. Ch. (°).

Again, by the 143d of the General Rules at Common Law of Hilary Term, 1853 ('), it is ordered that "Where an agent in town, or an attorney in the country, is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself."

Here Mr. Leadbitter was a quasi clerk to the solicitors on the record, for a clerk means a person employed by the solicitor to get up the evidence; and even if not within the letter he is within the spirit of the rule.

Dickinson, Q.C., and Yate Lee, for the plaintiff: rule was at first limited to affidavits sworn before the attorney in the cause, and did not extend to his clerk, if a commissioner. It has, however, been since extended, and it now embraces both the solicitor on the record and his clerk, as being the persons by whom the affidavits have to be prepared; but beyond this the court has never gone. There is no pretence for saying that Mr. Leadbitter is either the solicitor on the record, or the agent or clerk of the solicitors, who are the Duke's private solicitors, or that he prepared the affidavits. It is said that he is acquainted with all the facts of the case, but who could be better acquainted with the facts of the case than the commissioner in Foster v. Harvey, where the plaintiff was himself a solicitor, and an affidavit sworn by him before one of his own clerks was ad-779] mitted \*in evidence. In that case, on appeal ('), Lord Justice Turner said that the rule ought to be confined

<sup>(1) 8</sup> Beav., 290.

<sup>(\*) 10</sup> Hare, App. ii. (\*) Law Rep., 9 Eq., 187. (\*) 11 W. R., 899; S. C. on appeal, 9 L. T. (N.S.), 405.

<sup>(5) 5</sup>th ed., 203. (e) 2 Lush. Pr., 3d ed., p. 876.

<sup>(</sup>¹) 3 N. R., 98.

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to the case of solicitors on the record and their clerks, and Lord Romilly, M.R., in In re Gregg ('), referring to these remarks, expresses himself as of the same opinion. if the agent in town is the solicitor on the record, it is no objection to the affidavit of the party that it is sworn before his own attorney in the country: Read v. Cooper (\*); Williams v. Hockin (\*); Tidd's Practice (\*). These authorities lay down the rule; and this gentleman, who is not even the country solicitor, is neither within the letter nor the spirit of it.

W. Pearson, in reply.

Hall, V.C.: My present impression is that the objection must be sustained, and that these affidavits are within the principles acted upon by the Court of Chancery with reference to the necessity of having the evidence taken before persons who are unbiassed in the matter. That conclusion is fortified by the rules of common law referred to in the argument, which treat the country solicitor as in the same position with the town solicitor. And I think the case is within the principle of the rule that the clerk of the solicitor on the record cannot be allowed to be the commissioner to take the evidence. Accordingly, it appears to me that the country solicitor employed by the town solicitor (who is the real solicitor in the action, and is not acting merely as agent) to get up the evidence, and do what is necessary with reference thereto in the country is quite as obnoxious to the rule as a clerk would be. That is my present impression. But as the decision of the point, if I decide it that way, will go beyond any previous actual decision in this branch of the court, and the case on this point seems to a considerable extent a new case, I think I should not be doing justice if I rejected this evidence without giving the plaintiff an opportunity of calling the witnesses to whose affidavits the objection \*applies, and of taking their evidence viva voce. [780] The practical effect of this would be to postpone the hearing unless the objection is withdrawn.

W. Pearson: My principal reason for not withdrawing the objection is that I want to see those witnesses.

HALL, V.C.: I have not yet absolutely decided the ques-

tion, and will give it further consideration.

The objection was ultimately withdrawn, except as to the affidavits of two witnesses who attended on a subsequent day and were cross-examined.

<sup>(1)</sup> Law Rep., 9 Eq., 187.

<sup>(4) 9</sup>th ed., vol. i, p. 494; New Prac-) 5 Taunt., 89. tice, p. 244.

<sup>(\*) 8</sup> Taunt., 435.

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1878. Feb. 6. Hall, V.C., in delivering judgment in the action, said: It was said in the course of the argument in this case that some affidavits were improperly sworn before the country solicitor. At the time when that objection was discussed and considered I stated my opinion that it was a good objection. I have since then further considered that objection, and I desire to say that, having done so, I adhere to my former opinion. The point is of some practical and general importance, being one of principle, and not of mere technicality; and I think that is the fair conclusion to be drawn from the authorities which were referred to. I may also mention that the cases upon the subject are nearly all of them collected and commented upon in the case of Ross v. Shearman (1).

Solicitors: Bell & Steward; John Tucker, agent for T. W. Welford, Hexham.

(1) Coop. C. P. (1846), 172.

An affidavit will not be allowed to be read if taken before an attorney in the cause: Taylor v. Hatch, 12 Johns., 840; Willard v. Judd, 15 Johns., 581; Anonymous, 4 How. Pr., 290.

It is irregular for a complaint to be sworn to before the plaintiff's attorney, but it cannot be treated as a nullity. The defendant's remedy is by motion (the first opportunity) to set it aside: Gilmore v. Hempstead, 4 How. Pr., 153.

The rule only prohibits an affidavit taken before an attorney from being read on a motion in court. It does not apply to an affidavit of admeasurers of dower: Griffin v. Borst, 4 Wend., 195.

The rule applies only to affidavits

The rule applies only to affidavits made before an attorney in a suit pending, not to those preparatory to the commencement of one, as an affidavit to obtain an allowance of a writ of certiorari: Vorey v. Godfrey, 6 Cowen, 587; Adams v. Mills, 8 How. Pr., 219.

Though it does to an affidavit issued with a complaint, on which to indorse a requisition to the sheriff to take property in replevin: Anonymous, 4 How. Pr., 290.

The rule does not prohibit the making of such an affidavit before a partner of a solicitor of record, who does not appear as such on the record: People v. Spalding, 2 Paige, 326; Hollenbeck v. Whitaker. 17 Johns. 2.

v. Whitaker, 17 Johns., 2.

Nor before counsel in the cause:
People v. Spalding, 2 Paige, 326; Willard v. Judd, 15 Johns., 531.

Contra: Dere v. Geiger, 9 N. J. Law, 225. Fry, J.

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[7 Chancery Division, 781.]
V.C.H., Jan. 11, 18, 24; Feb. 7, 1878.
\*EDEN V. NAISH.

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[1876 E. 121.]

Partnership, Action for Dissolution of—Agreement of Compromiss—Repudiation by Plaintiff—Summons by Defendent to stay further Proceedings in the Action—Judicature Act, 1878, s. 24, subss. 5, 7—Jurisdiction—Costs of one Counsel for each of two Defendants, Co-partners.

A partnership having, in an action brought by the plaintiff, been by order of the court dissolved, the plaintiff and defendants signed an agreement of compromise, whereby it was agreed that the plaintiff should be paid a sum of money for his share in the business.

The plaintiff subsequently repudiated the agreement, and proposed to proceed with

his action, alleging that his signature had been obtained by fraud :

Held, on summons taken out by one of the defendants, and supported by the codefendant, that the court had, under the Judicature Act, 1873, s. 24, subss. 5, 7, jurisdiction to order the stay of all further proceedings in the action:

Held, also, that as the defendants had severed upon the summons, and been represented by four counsel, the costs to be paid by the plaintiff would be for one counsel only for each defendant.

[7 Chancery Division, 789.] FRY, J., Dec. 19, 20, 21, 1877.

# \*LUKE V. SOUTH KENSINGTON HOTEL COMPANY. [789

Parties—Mortgage—Foreclosure—Action by one alone of several Co-mortgagees—Action to set aside Deed by party who did not execute it—Judicature Act, 1873 (86 & 37 Vict. c. 66), s. 24, subs. 7—Rules of Court, 1875, Order xv1, rr. 2, 18.

As a general rule, one of several co-mortgagees cannot maintain an action to foreclose the mortgage, making the other co-mortgagees defendants, even though they do not oppose the foreclosure.

Semble, that such an action might be maintained if the plaintiff's co-mortgagees were colluding with the mortgagor, or if it were necessary that the court should act in haste to protect the mortgaged property.

in haste to protect the mortgaged property.

A person named (jointly with others) as a party to a deed, but who did not execute it, cannot alone maintain an action to have the deed declared invalid.

If it was intended that the deed should not be binding in equity unless all the joint parties should execute it, those who did execute it are capable of joining in an action to have it declared invalid, and in an action for that purpose they ought to be named as plaintiffs.

This was a suit commenced by bill filed in the High Court of Chancery on the 6th of February, 1875, for the purpose of obtaining a declaration that a certain deed of the 24th of August, 1870, was invalid and ineffectual to release the defendant company, or the premises comprised in an indenture of mortgage of the 23d of May, 1864, from any part of

25 Eng. REP.

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the mortgage debt of £9,216 thereby secured, and for foreclosure of the mortgage. The mortgagees were the plaintiff William Luke, and Edward Davies Browne and Sampson Sandys, two of the defendants, the mortgage money belonging to them as trustees of the will of Dr. Stephen Luke. The defendant company were the owners of the equity of

redemption of the mortgaged property.

The plaintiff and the defendants Browne and S. Sandys were the trustees of the will of Dr. Luke, the plaintiff's father, who died in the year 1829, and in the year 1864 there were standing in their names as such trustees two sums of £7,188 9s. 4d. and £753 2s. 2d. Reduced 3 per Cent. Annuities, and two sums of £2,000 and £373 1s. 3d. New 3 per Cent. Annuities. Mrs. Blakeley, a granddaughter of the testator, 790] was tenant for life of \*the sums of £7,188 9s. 4d. and £2,000, and also of one-fifth part of the two smaller sums. The plaintiff was entitled to one-fifth part of the two smaller sums, and the other three-fifths belonged respectively to three of his brothers.

In May, 1864, the plaintiff and the defendants Browne and Sandys sold these four sums of stock and handed the proceeds of the sale, amounting to a sum of £9,216 cash, to a company called the South Kensington Hotel Company (not the defendant company), which will be called, for the sake of distinction, the old company, upon the security of a mortgage dated the 23d of May, 1864, of some leasehold property at South Kensington belonging to the old company. The property was already subject to a prior mortgage to the trustees of the County Fire Office, to secure a sum of £13,600. The mortgage deed of the 23d of May, 1864, contained the ordinary mortgage covenants by the old company, and it provided for the payment of interest on the mortgage debt at the rate of 61 per cent., reducible to 51 per cent. on punctual payment. Down to the 7th of April, 1869, Messrs. Sandys & Knott acted as the solicitors of all the trustees of Dr. Luke's will, but on that day the plaintiff withdrew his retainer and thenceforth employed Messrs. Janson, Cobb & Pearson as his solicitors in the matter of the trust. In the year 1869 the old company were in difficulties, and were unable to pay the interest on the mortgages upon their property, and the County Fire Office were threatening to sell the property under a power of sale contained in their mortgage. In November, 1869, Mrs. Blakeley commenced a suit in the Court of Chancery against the three trustees of Dr. Luke's will, seeking to make them accountable for a breach of trust by reason of the investment upon Fry, J. Luke v. South Kensington Hotel Company.

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the mortgage of the 23d of May, 1864, which was not authorized by the terms of the will. This suit was afterwards

compromised.

In 1869 the defendant company were incorporated for the purpose of taking over the business, assets, and liabilities of the old company, and as part of this scheme of reconstruction they proposed to the trustees of Dr. Luke's will that they should accept a composition of £5,725 upon the mortgage debt of £9,216, and leave that sum upon the security of the mortgaged property for a term of ten years at 5 per cent. interest, reducible to 4 per cent. \*on punctual [79] payment, the new company covenanting for payment of the The defendants Browne and S. Sandys assented to this proposition. The plaintiff was advised by his solicitors that the proposition was one which it would be desirable to accept if it could be legally assented to, but they conceived that there were legal difficulties in the way which could not be removed, and in consequence of this the plaintiff refused to assent to the proposal. Resolutions were, however, passed for the winding up of the old company subject to the supervision of the court. The new company was incorporated, and an agreement was entered into between the liquidators of the old company and the new company for the sale to the new company of all the property of the old company, including the interest of the old company in the property comprised in the mortgage of the 23d of May, 1864. This agreement was sanctioned by the court, and A deed to carry into was afterwards carried into effect. effect the proposed reduction of the mortgage debt of £9,216 was prepared by the solicitors of the new company, apparently under the impression that the plaintiff either had assented to the proposition, or would do so. This deed bore date the 24th of August, 1870, and purported to be made between the defendant company of the one part, and the plaintiff and the defendants Browne and S. Sandys of the other part, and it was expressed to be thereby witnessed that the plaintiff and the defendants Browne and S. Sandys did thereby release the old company and the defendant company, and the property comprised in the mortgage of the 23d of May, 1864, from all interest which had accrued due or was owing on the sum of £9,216 previously and up to the 1st of January, 1864, and also from £3,456, part of the £9,216. And the defendant company did thereby covenant with the plaintiff and the defendants Browne and S. Sandys, their executors, administrators, and assigns, to pay to them the sum of £5,760 on the 1st of July, 1870, to-

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gether with interest thereon at the rate of 5 per cent. per annum as from the 1st of January, 1870, and to pay interest at the same rate half-yearly on the sum of £5,760 (in case the same should not be paid on the 1st of July, 1870), or on so much thereof as should for the time being remain unpaid. There was a proviso for the reduction of the interest to 4 per 792] cent. \*in the event of punctual payment. And it was agreed that if the defendant company should pay the interest at the rate of 5 per cent. within three calendar months next after the respective half-yearly days of payment, the mortgagees would not call in the principal, or take any proceedings for foreclosing the equity of redemption in the mortgaged property until the end of the term of ten years from the 1st of January, 1870; but if at any time during the ten years default should be made in payment of the interest, the conditional release thereinbefore contained was to be void, and all the rights of the mortgagees under the original mortgage of the 23d of May, 1870, were to revive. This deed was executed by the defendant company, and by the defendants Browne and S. Sandys, but the plaintiff refused to execute it. After its execution the defendant company paid interest at the reduced rate upon the reduced mortgage debt to the solicitors of the defendants Browne and S. Sandys, and interest was paid by them to Mrs. Blakeley according to the terms of the compromise of Mrs. Blakelev's suit.

The bill in this suit was filed on the 6th of February, 1875, against the new company, G. N. Mayhew (who held a third mortgage upon the property comprised in the mortgage of the 23d of May, 1864), and Browne and S. Sandys, co-mortgagees and co-trustees with the plaintiff of the will of Dr. Luke. Mrs. Blakeley was afterwards added as a defendant; but none of the other cestuis que trust were made parties. The bill alleged that the deed of composition of the 24th of August, 1870, was wholly inoperative and ineffectual to release or to postpone payment of the mortgage debt of £9,216, or the interest thereon, or to release or extinguish any of the rights reserved to the plaintiff and his co-trustees by the deed of the 23d of May, 1864; that the £9,216, together with a considerable arrear of interest thereon, was still due to the plaintiff and his co-trustees upon the security of the mortgage of the 23d of May, 1864, but that the defendant company alleged that the deed of the 24th of August, 1870, was valid and effectual notwithstanding the fact that the plaintiff never executed the same, and denied that anything was due to the plaintiff and his co-

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trustees under the mortgage of the 23d of May, 1864. The bill did not state that the plaintiff had \*applied to [793 the defendants Browne and S. Sandys to join him as co-

plaintiffs.

The bill prayed a declaration accordingly that the deed of the 24th of August, 1870, was invalid and ineffectual, and that it ought to be delivered up to be cancelled; that an account might be taken of what was due to the plaintiff and his co-trustees for principal and interest, under the deed of the 23d of May, 1864; that the defendant company and the defendant Mayhew might be decreed to pay to the plaintiff and the defendants Browne and S. Sandys the amount so found due, and to pay the plaintiffs the costs of the suit, and that in default of payment the defendant company and the defendant Mayhew might be foreclosed of all equity of redemption in the mortgaged property. No relief was asked against the defendants Browne and S. Sandys, or against Mrs. Blakeley.

The defendant company and the defendant Mayhew by their answer insisted that the plaintiff and Mrs. Blakeley had assented to the arrangement for the redemption of the mortgage debt, and that, notwithstanding the fact that the plaintiff had not executed the deed of the 24th of August, 1870, he and Mrs. Blakeley were bound by the arrangement

contained in it.

The defendants Browne and S. Sandys by their answer said that they were not made aware of the plaintiff's refusal to consent to the proposal for the reduction of the mortgage debt until after they had executed the deed of the 24th of August, 1870. They said that they executed the deed on the advice of their solicitors, and as they believed with the full concurrence of Mrs. Blakeley and her solicitors, and that they were advised, and believed, that under the circumstances the proposed arrangement was the most beneficial one that could be made for all persons interested in the mortgage debt. And they submitted the question of the validity of the deed to the court.

Mrs. Blakeley did not put in any answer.

This was the trial of the cause.

Evidence was adduced to show that the plaintiff and Mrs. Blakeley had assented to or had become bound by the arrangement contained in the deed of the 24th of August, 1870, but the court held that this was not proved.

\*Kekewich, Q.C., and S. Dickinson, for the plain- [794 tiff: The plaintiff is entitled to a decree and foreclosure in the form in which he asks for it. The deed of composi-

tion not having been executed by him, it cannot, whatever be its legal effect in releasing the debt due to the mortgagees jointly, alter the equitable rights of the mortgagees under the original mortgage deed. And the defendants Browne and Sandys do not oppose the relief which the plaintiff asks. Under the present practice no difficulty can arise as to parties or misjoinder: Rules of Court, 1875, Order xvi, rr. 2, 13.

But it is not necessary to go to the extent of asking for foreclosure; the plaintiff may ask simply to have the deed of composition declared void and delivered up because it is a cloud on the title of the mortgagees, and may prevent their

enforcing their rights under the original mortgage.

[FRY, J.: The deed of composition is not set up against you yet, and there is nothing to show that it will be. If it is void, as you say, why should you not put in force your remedies under the original mortgage? and if the deed of composition is then set up against you, will it not be time enough to get it out of your way?]

The mortgage debt is released at law by the execution of the deed by two of the co-mortgagees, though they may not be bound in equity, the intention being that the deed should

not operate unless all the three executed it.

[FRY, J.: If that be so, the two who executed it could maintain an action to have it declared not binding upon them: *Evans* v. *Bremridge* ('). I think it is a novelty for a person who did not execute a deed to ask to have it declared void.]

It would be practically impossible to sell the property while that deed is in existence, and the plaintiff is entitled

to have that cloud on the title removed.

Fischer, Q.C., and Millar, for the defendants Browne and Sandys, stated (in answer to a question put by the court) that those defendants executed the deed of composi-795] tion in the belief that \*the plaintiff and Mrs. Blakeley would sanction the arrangement. They said that the defendants Browne and Sandys did not oppose the relief sought by the plaintiff, but they declined to be made coplaintiffs.

[FRY, J., referred to Thornton v. McKewan (\*).]

North, Q.C., and Rendall, for the defendant company: Sect. 24, sub-sect. 7, of the Judicature Act, 1873, and Order xvi, rules 2, 13, do not help the plaintiff.

[FRY, J.: The plaintiff might have brought an action against his co-trustees to compel them to join in a foreclosure

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action. May he not include the two actions in one to avoid circuity of action?

He could not maintain such an action against his co-trustees in the absence of the cestuis que trust: Butler v. Butler ('). And even if the cestuis que trust were all made parties, the question whether a foreclosure action ought to be brought ought not to be raised in an action to which the mortgagor is a party; he has no interest in the determina-

tion of that question.

This is the first instance in which one of several co-mortgagees has attempted to maintain a foreclosure action. The action raises a question between the plaintiff and two of the defendants which has nothing to do with the question which arises between the mortgagees as a body and the mortgagor. This cannot be done: Kevan v. Crawford (\*). Who would be entitled to say whether there should be a foreclosure or a sale? the plaintiff, or the defendants his co-trustees?

Then, if the plaintiff is not entitled to a decree for foreclosure, he is not entitled to have the deed declared invalid.

[FRY, J.: There are cases in which the Court of Chancery has ordered a void deed to be delivered up as being a cloud upon the title to real estate: Mayor of Colchester v. Lowten (\*).]

The two mortgagees who did execute the deed have no equity against the company. There is nothing to show that

the deed was delivered as an escrow.

\*[FRY, J.: But if the deed was not intended to [796 operate till all three had executed it, could not the one who did not execute it come to the court, upon the principle laid down by Lord Eldon in Mayor of Colchester v. Lowten (\*),

and ask to have the deed delivered up?

In such a case the two who did execute the deed might ask to have it delivered up: Underhill v. Horwood ('); Evans v. Bremridge('). If there is a cloud upon the title of the mortgagees, it is a cloud upon the title of all three, and it cannot be removed at the suit of one. Non constat that the defendants consider it a cloud. They may think the arrangement a very beneficial one: Onions v. Cohen (').

[Fry, J., referred to Bromley v. Holland (').]

The deed is valid as between the company and the defendants Browne and Sandys.

[FRY, J.: I doubt whether it is.]

(1) 5 Ch. D., 554; 22 Eng. R., 296; 7 (4) 10 Ves., 209. Ch. D., 116; 23 Eng. R., 452. (5) 2 K. & J., 174; 8 D. M. & G., 100. (7) 6 Ch. D., 29; 22 Eng. R., 626. (5) 2 H. & M., 854.

(3) 1 V. & B., 226, 244. (1) 7 Ves., 3, 22.

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At law the release of the mortgage debt by two of the mortgagees is enough to destroy it, Charlton v. Earl of Durham ('); and the fact that they are trustees makes no difference. The company had no notice of the trust.

The evidence shows that the plaintiff assented to the arrangement contained in the deed, or, at any rate, that he has become bound by it by subsequent conduct, and the same observation applies to Mrs. Blakeley: Cheeseborough v. Wright(\*).

Fischer, Q.C., and Millar, for the defendants Browne

and Sandys.

Cookson, Q.C., and Bush, for Mrs. Blakeley: It is clearly proved that Mrs. Blakeley did not assent to the reduction of the mortgage debt. No relief is asked against her, and she is entitled to her costs.

Kekewich, in reply: It is not necessary that all the ces-797] tuis que trust should be made \*parties for the purpose of raising the question whether a foreclosure action ought to be brought. The defendants Browne and Sandys do not allege either that it would not be advisable to have a foreclosure, or that the cestuis que trust object to it. They only decline to be co-plaintiffs, because they executed the deed of composition. The trust estate as a whole is not bound by the deed, and the cestuis que trust would be entitled to have the original security realized. Under such circumstances one trustee can maintain this action for the benefit of the trust. At any rate, the plaintiff is entitled to have the cloud on the title removed.

[FRY, J.: Carew's Case(\*) shows that if two persons execute a deed on the faith that a third will do so, and he does not, they are not bound in equity, and that they would be entitled to ask the court to make a declaration to that

effect.]

Suppose one of two co-mortgagees was of unsound mind, could not the other maintain an action to foreclose the mortgage if it was desirable that it should be foreclosed? Why should it be necessary to bring two actions, the first to determine whether a foreclosure action ought to be brought? The question is merely one of form. All the materials are before the court, to enable it to determine whether the mortgage of May, 1864, is still subsisting. The only person who objects is the mortgagor: Hawkshaw v. Parkins (').

FRY, J., after stating the facts, and deciding that the plaintiff was not bound by the arrangement contained in the

<sup>(1)</sup> Law Rep., 4 Ch., 433.

<sup>(8) 7</sup> D. M. & G., 48.

<sup>(2) 28</sup> Beav., 283.

<sup>(4) 2</sup> Sw., 539.

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deed of composition, either originally or by reason of any subsequent conduct, continued:

But then comes a very grave and important question, whether, assuming that I am correct in the conclusion at which I have arrived, this action is nevertheless well founded. Now, the suit or action may be regarded in two points of It may be viewed as a foreclosure action coupled with a prayer for relief against the deed of composition. asking, in effect, that the court will get that deed out of the way for the purpose of foreclosure. In that point of view it would be essentially a foreclosure action. But it may \*further be said that, even if foreclosure cannot be had, relief may be given to the extent of declaring the deed to be void, and directing it to be delivered up to be cancelled. on the ground that it is a cloud on the plaintiff's title. these views have been suggested to me by Mr. Kekewich. I must consider, in the first place, whether the action can be maintained as a foreclosure action, that is to say, whether, when a mortgage has been made to three persons jointly, one of those three can foreclose the mortgage, making the other two defendants to the action. It is admitted that no precedent can be produced for such a proceeding, and it appears to me that the inconveniences of it are manifold and In the first place, it would follow that you might have as many actions pending as there were mortgagees. Take the case, with which we are very familiar, of a mortgage for a large sum of money made to half a dozen persons as trustees for an insurance company, the name of the company not appearing on the face of the deed. You might have six foreclosure actions, one brought by each of the mortgagees, against the mortgagor, naming the other five as defendants on the record. Then there are further questions which would arise at the hearing. In a foreclosure action you may have foreclosure or sale. How is the question, which it is to be, to be determined? Would the plaintiff be dominus litis for this purpose, so that he could dictate to the other mortgagees what relief was to be had, or must there be a struggle between the co-mortgagees as to what the nature of the relief to be had should be? It appears to me that the inconveniences of such a course are very manifest. But then it is said that where there are several co-mortgagees one of them might have a bad reason for not desiring to foreclose, or might have no reason at all. He may be content to leave things as they are, and decline to join in the foreclosure action. Such questions undoubtedly have often arisen, and in all probability will often arise again, and they

25 Eng. Rep.

may have to be determined in some way. But I am of opinion that they must be determined in a separate and independent proceeding, and that the mortgagor is not to be harassed by conflicts and controversies between his mortgagees, but that the question whether an action for foreclosure shall or shall not be brought is not to be determined in the action for foreclosure itself. To mix up the question whether an action ought to be brought with that ac-799] tion itself seems to me inconvenient to \*the last degree, and upon that ground I come to the conclusion that the plaintiff cannot maintain this action as a foreclosure action.

Can be then maintain it as an action for the purpose of having it declared that the deed of composition is void? On what title is that deed said to be a cloud? On the title of the plaintiff and his co-mortgagees. But is that deed certainly a cloud on the title? The deed is one which is intended to give effect to a new contract—a novation. intended to give a new security from a new debtor. Whether it gives a better security or a worse than the old deed. I do not know. But I do know this, that in 1869, when the negotiation took place, Mr. Luke and his co-trustees all thought it was a good arrangement, and that it would be wise to accept the security of the new company, provided it could be This is not a case in which the deed sought legally done. to be set aside is unquestionably a cloud on the title of the plaintiff in the sense of being an injury to the title. be, for aught I know, a great boon to the trust estate represented by the plaintiff and his co-trustees. But, further than that, assuming that it is a cloud upon the title, can the plaintiff sue alone? It appears to me clear that if the two trustees who did execute the deed are not bound by it in equity, they might alone, or certainly together with Mr. Luke, maintain an action to have it delivered up to be can-The cases of Underhill v. Horwood (1), Carew's Case (\*), and Evans v. Bremridge (\*), certainly lead me to that conclusion. If I were to allow Mr. Luke to sue alone to set aside the deed, it appears to me that the same inconvenience would follow as I have already pointed out with regard to the foreclosure. You might have a conflict between the plaintiff and those persons who are jointly interested with him in the estate, and into that conflict you would drag the person who claims the benefit of the deed. Again, supposing there were, as there are here, numerous parties who claim an interest

<sup>(1) 10</sup> Ves., 209. (2) 2 K. & J., 174; 8 D. M. & G., 100.

Fry, J.

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in the trust estate, each of them might maintain a separate action, and to that action the person claiming the benefit of the deed must in all cases be a party. I am of opinion that it is expedient that the internal question, whether an action should be brought or not, should be litigated between the persons who are \*interested in the determination of [800] that question. In the case of a trust estate it would undoubtedly be necessary to have all the cestuis que trust properly before the court, and in the action so constituted the court might determine between the various views taken by the trustees what would be proper to be done. But it would be a great inconvenience, a great hardship, to a mortgagor or a person claiming the benefit of an instrument, if I were to allow an intestine quarrel, between persons entitled to the mortgage money or the estate dealt with by the instrument, to be litigated in the same action as that in which the mortgage is sought to be enforced or the instrument to be set aside. On that broad ground I determine that the present plaintiff cannot maintain this action.

I desire to make two other observations. One is this. does not appear that Mr. Luke made any application to his co-trustees to join in the action; and when I asked the counsel for Messrs. Browne and Sandys whether they were willing to be placed as co-plaintiffs upon the record, they declined so to be placed. The other observation is this, that what I have said with regard to the proper constitution of such actions does not apply necessarily, or perhaps at all, to cases in which one of several persons jointly interested is colluding with the principal defendant, or to cases in which it may be necessary for the court to intervene with unusual activity by way of giving protection to the property. But what I do determine is this, that in an action such as this, for foreclosure and setting aside a deed, the domestic quarrel whether such an action shall or shall not be brought ought to be determined separately, and that the person who claims the benefit of the deed, or who stands in the position of mortgagor is not to be harassed by controversies of the nature which have been here ventilated between persons who claim an interest as mortgagees. On these grounds I am compelled to decide against the plaintiff, and to give judgment for all the defendants with costs.

Solicitors for plaintiff: Janson, Cobb & Pearson.
Solicitors for defendant company: Mayhew, Salmon & Whiting.

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Solicitors for defendants Browne and Sandys: Sandys & Trevenen.

Solicitors for tenant for life: W. & A. Ranken Ford.

See 13 Eng. Rep., 757-8 note; 23

Eng. Rep., 532 note.

If the consent of one or more to bring a joint action cannot be obtained, he or they may be made defendant un-

der section 119 of the old code (§ 448 present code), in which case the facts should be stated in the complaint, and proved upon the trial: Hasbrouck v.

Bunce, 62 N. Y., 475.

Where the several members of classes of persons interested in an estate severed in instructing counsel, the court, though it gave them costs out of the estate, directed the attention of the master to the subject, on taxation: Crawford v. Lundy, 28 Grant's (U.C.) Chy., 244.

As to how far one who signs a bond or other obligation on condition that it shall be signed by another before delivery is bound thereby, if delivered without such signature, see 20 Eng. Rep., 595 note; 25 Am. Rep., 706 note; 1 Am. Law Review, N.S., 177; 1 Kental Law Rev tucky Law Reporter, 23-4.

Where a deed shows upon its face that it was intended to be jointly executed, so that all parties shall be bound by the covenants, an execution and delivery by some of the parties only is incomplete, and does not bind them: Arthur v. Anderson, 9 South Car. Rep., 234, affirmed 11 id., 56.

A surety who signs an official bond upon an agreement with the principal obligor that he is not to become liable until the bond is signed by others, whose names are written in the obligatory part of the instrument, cannot be held if the bond is delivered by the obligor to the obligee in violation of such agreement.

In such case, the incomplete condition of the instrument appearing on its face, is notice to the obligee of the conditional signing of the surety, sufficient to put him on the inquiry, and bind him: State v. Robinson, 8 Am. Law Rec., 723.

A guardian's bond, calling in its premises for three sureties, was executed by two of them and left with the surrogate, they, at the time, telling the guardian to bring in the third

surety, and he promising to do so, held binding on those executing, although the third surety failed to execute: Or-

dinary v. Thatcher, 41 N. J. Law, 408.
Where a recognizance began "We,"
naming the bail proposed, "hereby acknowledge ourselves replevin bail, etc., having been prepared, was signed by one of the recognizors only, to become operative when signed by the other; but it was never signed by the latter or approved by the clerk. Held that the recognizance never became operative: McKinley v. Snyder, 65 Ind., 143.

Parol testimony is admissible to show that at the time of the delivery of a promissory note to the payee, the note was not to be considered as delivered until it was signed by other parties: Bovey v. Chilicothe, etc., 7 Am. Law Rec., 548.

A bond is signed by a principal obligor and a number of sureties, and there are several scrolls below the names of the sureties who sign it. In other respects, the bond is complete and perfect on its face; but the sureties sign it and deliver it to the principal obligor, on condition that he shall obtain additional signatures to execute it, before he delivers it to the obligee; but he violates the condition and delivers it to the obligee without obtaining additional sureties:

Held, the bond is binding on the sureties, unless the obligee had notice of the conditions on which they executed it; and the fact that there were other scrolls to the instrument to which no name was signed, was not sufficient to put the obligee upon inquiry as to the authority of the obligor to deliver the bond to him.

A bond signed by a principal obligor and sureties, apparently perfect and complete, may be avoided by parol proof that the obligee, at the time he received it from the principal obligor, had notice that other persons were to sign it in order to make the instrument effectual as to those who did sign it. But, in such a case, the evidence ought to be very clear and satisfactory: Nash v. Fugate, 4 Virg. L. J., 340.

Where the instrument signed by the

sureties of an officer was a printed form of a bond, with blanks for inserting in the body the names of the sureties, amount of penalty, office to which the principal was elected and date of election, etc., and these blanks were filled up by the city officials without the knowledge or consent of the sureties: Held, that as to the sureties the bond was absolutely void, and that knowledge of these facts by the clerk, who was the official custodian of the bonds and the person to whom they should be delivered, was notice to the city: Gage c. Chicago, 2 Bradwell (Ills.), 332, 345, and cases cited; Allen v. Marney, 65 Ind 399

Where, on an appeal bond, a surety signs the bond and intrusts it to the principal for delivery to the mayor, only upon its being also signed by another whose name appears in the body of the bond as a co-surety, its delivery by the principal without the knowledge or consent of the surety and without the signature of such co-surety, and its acceptance and approval by the mayor, do not render the surety liable. And the fact that the principal had erased the name of such surety before delivering the bond to the mayor, does not alter the rule: Allen v. Marney, 65 Ind., 399.

A private agreement between the surety and principal of an official bond, in the nature of a condition, will not affect the rights of the public, when the bond has been accepted by the proper authority without notice of the condition, especially if there be nothing on the face of the bond to excite sus-

picion: Amis v. Marks, 3 Lea (Tenn.), 573-4, and cases cited.

Where an agreement to pay a claim by some of the heirs against the estate is made by executors, signed by some of them unconditionally, and by another with the condition that it shall be signed by all the heirs of the deceased; though never so signed, it is binding upon all the other executors and their personal representatives, and upon him also if assented to by all the heirs except those for whose benefit the agreement was made, as their assent can be presumed.

Where a joint instrument is drawn to be signed by several and one who fails to sign, all are discharged. It is otherwise in the case of a joint and several instrument, a security for an antecedent debt, or where the parties signing knew that fewer than the whole number were to sign it: Finney v. Finney, 1 Pearson (Penn.), 70.

Sureties on a bail bond in answer to

Sureties on a bail bond in answer to a scire facias pleaded non est factum, and alleged that, without their knowledge, consent or authority, the bond since its execution had been materially altered by the erasure of the name of another surety against whom no judgment nisi had been taken, wherefore they were not liable. Held a sufficient answer to the scire facias: Davis v. State, 5 Texas Ct. App., 48.

In such cases those above the name are bound, but those below are not, for it may have been that the signature erased was the principal inducement for them to sign; People v. Lynn, 2 Labatt (Cal.), 187; Id., 34.

[7 Chancery Division, 801.]
FRY, J., Jan. 11, 12, 14, 15, 1878.

\*SIEGERT V FINDLATER.

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[1876 S. 96.]

Trade-mark—Trade Name—Name of Place—Fraud—Injunction—Collateral Misrepresentation by Plaintiff.

The plaintiff manufactured a fluid which he sold under the name of "Aromatic Bitters," and it was described by this name upon the wrappers of the bottles in which it was sold. It became, however, generally known in the market by the name of "Angostura Bitters," it having been originally manufactured at the town of Angostura in Venezuela. The name of this town was afterwards, by a decree of the state, changed to Cuidad Bolivar. After this change had taken place, the defendant began to manufacture in the same town a different fluid, which he at first sold under the name of "Aromatic Bitters," but, having been restrained in an English colony from

using that name, he adopted the name "Angostura Bitters," and placed it upon the wrappers of his bottles, also registering his wrapper at Stationers' Hall. His wrappers were very similar to those of the plaintiff, but they contained a statement that the fluid was prepared by the defendant. After this the plaintiff adopted the name "Angostura Bitters," and placed it upon his wrappers, and he brought an action against the defendant, claiming an injunction to restrain him from imitating the plaintiff's wrappers, and from using the name "Angostura Bitters." At the time when the action was brought the plaintiff had ceased to carry on his manufacture at Cuidad Bolivar:

Held, upon the evidence, that the defendant had been guilty of an attempt to deceive, and that, though he could not be restrained from using the name "Angostura Bitters," in case he should ever discover the plaintiff's secret, and manufacture the same fluid, yet he must be restrained from using the name so as to deceive the public

into the belief that his fluid was the plaintiff's.

It was alleged by the defendant that the plaintiff was disentitled to relief, because, at the time of the trial, he was using wrappers which contained a misrepresentation, The plaintiff did not begin to use those wrappers until after the action had been brought:

Held, that there was in fact no misrepresentation in the wrappers in question, but that, even if there had been, a misrepresentation not made till after the commence-

ment of the action would not have affected the plaintiff's title to relief.

This action was brought to restrain the defendants, Messrs. Inglis & Wulff, from selling any bitters in bottles enveloped in wrappers in imitation of the wrappers used by the plaintiffs, or any other wrappers or labels having the name "An-802] gostura" \*thereon, or so contrived as to represent the preparation offered for sale by the defendants as being the cordial, known as "Angostura Bitters," manufactured

and sold by the plaintiffs.

Dr. Siegert, the father of the plaintiffs, resided in the town of Angostura, in the republic of Venezuela. He discovered a secret for the composition of a fluid which he described as "Aromatic Bitters," and in 1830 established a manufactory at that place, and manufactured the fluid and sold it in large quantities in England and other countries. After Dr. Siegert's death, in 1870, the business was continued by the In May, 1846, the name of the town of Angosplaintiffs. tura was, by a decree of the state, changed to Cuidad Bolivar, but the town continued up to the time when the action was commenced to be generally known in England by its old name. Dr. Siegert's fluid was sold by him, and afterwards by the plaintiffs, in bottles enveloped in paper wrappers, upon which was printed, in parallel columns in three languages, Spanish, English, and German, a description of the virtues of the preparation, and of the way in which and the purposes for which it was to be used. The heading. of the centre column, which was in English, was this:

"Aromatic Bitters,
"Prepared by Dr. Siegert at Angostura.
"(Now Cuidad Bolivar.)"

The headings of the other columns were similar.

Beneath the three parallel columns was a similar descrip-

tion, with a similar heading, in French.

The fluid obtained a large sale in England and other countries, and became generally known in the English market as "Angostura Bitters," though Dr. Siegert himself never described it by that name, nor did the plaintiffs make use of that name until (as will be presently stated) the year 1875.

In the year 1870 a Dr. Teodoro Meinhard, who had for

In the year 1870 a Dr. Teodoro Meinhard, who had for some years previously manufactured bitters, prepared from a recipe discovered by himself, at Upata, in Venezuela, removed his manufacture to Cuidad Bolivar. He sold his preparation in bottles which resembled in shape those used by the plaintiffs, and which were enveloped in paper wrappers having upon them a description in three languages, Spanish, English, and German, arranged in three parallel \*columns, a fourth description in French being printed [803 underneath the others. The heading of the centre column, which was in English, was this:

"Aromatic Bitters,
"Prepared by Teodoro Meinhard,
"Cuidad Bolivar, formerly Angostura."

The headings of the other columns were similar.

It was admitted that Meinhard's preparation was entirely

different from that of the plaintiffs.

In the year 1874 the plaintiffs instituted proceedings in the Supreme Civil Court of Trinidad against one William Ehlers, who was acting as the agent of Meinhard in Trinidad, and on the 3d of February, 1874, an interlocutory order was made restraining Ehlers, until the hearing of the cause, from selling or exposing for sale, or from exporting, any composition put up in bottles enveloped in wrappers having printed thereon the name "Aromatic Bitters," and a description of the uses, properties, and qualities thereof, in imitation of the wrappers used by the plaintiffs, or any other wrappers so contrived or expressed, as by colorable imitation or otherwise, to represent the composition sold by the defendant as being that manufactured and sold by the plaintiffs. Ehlers afterwards submitted to a perpetual injunction. After this Meinhard made some alterations in his wrappers, but he still continued to print upon them a description in three languages, in parallel columns, with a similar description in The heading of the centre column of French underneath. the altered wrappers, which was in English, was this:

# "Angostura Bitters, "Prepared by Teodoro Meinhard, Cuidad Bolivar, formerly Angostura."

The headings of the other columns were similar, and diagonally across the three columns there was printed in large red letters the words "Angostura Bitters." This wrapper

was registered at Stationers' Hall.

Early in the year 1875 the plaintiffs removed their manufacture to Port of Spain, Trinidad, and they then made an alteration in their wrappers. The description was still 804] printed in \*Spanish, English, and German, in three parallel columns, underneath which was a description in French.

The heading of the centre column, which was in English,

was this:

#### "Aromatic Bitters,

 $\mathbf{or}$ 

"Angostura Bitters,
"Prepared by Dr. Siegert, at Angostura."
"(Now at Port of Spain, Trinidad.)"

The headings in the other languages were similar.

Before this the plaintiffs had not used the words "Angos-

tura Bitters" upon their wrappers.

On the 9th of March, 1876, the plaintiffs commenced this action against Messrs. Findlater & Co., who were, as they alleged, selling a composition described as "Angostura Bitters," contained in bottles enveloped in wrappers which were an imitation of the plaintiffs' wrappers. The defendants Inglis & Wulff then wrote to the plaintiffs, admitting that they had sold the articles in question to Findlater & Co., and were answerable for so doing, and requesting that the action might proceed against them. Inglis & Wulff were accordingly made defendants, and Findlater & Co. were dismissed. Inglis & Wulff were the agents in England of one A. F. Nagel, of Hamburg, who was the general agent for the sale in Europe of Meinhard's bitters. The fluid sold by Inglis & Wulff was Meinhard's, and it was sold in bottles enveloped in wrappers of the form which he adopted after the injunction had been obtained against Ehlers in Trinidad.

The plaintiffs alleged that these wrappers were an intentional and fraudulent imitation of their own wrappers; that the plaintiffs' preparation had been long well known to the trade and the public in England and elsewhere as "Angostura Bitters"; that the introduction of the word "Angostura" into the wrappers of the bottles sold by the defendants

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was absolutely unnecessary, except for the purpose of passing off the composition sold by them as that of the plaintiffs; and that by the use of such wrappers the ordinary public were liable to be misled, and had, in fact, been misled, into purchasing the composition sold by the defendants instead of the plaintiffs' preparation. And the plaintiffs claimed

an injunction to the effect already mentioned.

\*By their statement of defence the defendants said [805] that it was in consequence of their containing, or being supposed to contain, Angostura bark, as well as from the place at which they were manufactured, that bitters manufactured at Ciudad Bolivar or Angostura had for many years been known as "Angostura Bitters." They denied that the plaintiffs' bitters had become universally known and distinguished as "Angostura Bitters," or that the plaintiffs had any exclusive right to use that term. On the contrary, they said that Meinhard was the only manufacturer of bitters who then carried on such manufacture at Ciudad Bolivar or Angostura, and that he claimed the exclusive right to use the term "Angostura Bitters."

This was the trial of the action.

The defendants admitted that they were indemnified

against the costs of the action by Meinhard.

It appeared that after the commencement of the action the plaintiffs altered again the form of the wrapper which they used in England. It was alleged by the defendants

that this new wrapper contained misrepresentations.

Cookson, Q.C., and H. Fellows, for the plaintiffs: It is clear that the defendants began in 1874 to use the name "Angostura Bitters" upon their wrappers with the view of passing off their manufacture as that of the plaintiffs; or, at any rate, that the use of that name is likely to have that effect; and, apart from the use of that name, the general form and design of the defendants' bottles and wrappers closely resembles the form and design of those of the plaintiffs, and is calculated and intended to deceive. And we have proved some instances of actual deception. The Glenfield Starch Case, Wotherspoon v. Currie ('), and Singer Manufacturing Company v. Wilson ('), are authorities in our favor.

[Fry, J.: The name "Angostura Bitters" has been used to signify the particular article manufactured by the plaintiffs, and it has only indirectly denoted the maker of the article, because the plaintiffs have been the only makers of that article. But any person who could discover the secret

<sup>(1)</sup> Law Rep., 5 H. L., 508. 25 Eng. Rep. 4 (2) 2 Ch. D., 434; 16 Eng. R., 827.

of the manufacture would \*have a right to make and 8061 sell the same article, the plaintiffs having no patent right. How, then, can I restrain the defendants absolutely from using the word "Angostura"? If they should even make the same thing as the plaintiffs, they would surely have a right to call it "Angostura Bitters." It is not like the Singer Case, where the name "Singer" originally indicated the maker of the machine, nor is it like the Glenfield Starch Case, where "Starch" was the genus and "Glenfield" was the species, and showed that "Glenfield Starch" was made

by a particular manufacturer.

Here the defendants' article is admittedly a different thing from the plaintiffs', and the calling it by the name which the plaintiffs' article has acquired in the market is a badge of fraud: Seixo v. Provezende ('). It is not conclusive in the defendants' favor that Meinhard is stated on the wrapper to be the manufacturer: Wotherspoon v. Currie ('); Singer Manufacturing Company v. Wilson ('). We are entitled, at any rate, to an injunction against the use of the words "Angostura Bitters," or of the word "Angostura" in the way in which the defendants have used it, or in any other way calculated to mislead the public. An important element in the case is the fact that the name of the town Angostura had been legally changed before Meinhard commenced his manufacture there.

We are entitled to an order similar to that which was made in the Apollinaris Water Case, Apollinaris Company

v. Edwards (').

[FRY, J.: There is this distinction: Apollinaris Water "Angostura Bitters" is an artificial compound.]

The value of the name consists in the general public use of it to describe the article, whether the name was originally

given by the vendor or not.

They referred also to Radde v. Norman (\*); McAndrew v. Bassett (\*); Raggett v. Findlater ('); Broadhurst v. Barlow (before Vice-Chancellor Wickens, Nov. 21, 1872).] 807] \*North, Q.C., and J. Cutler, for the defendants: The material point in the case is the use of the words "Angostura Bitters." They only mean bitters made at Angostura, and the evidence shows that, though the name of the town has

<sup>(1)</sup> Law Rep., 1 Ch., 192. (2) Law Rep., 5 H. L., 508. (3) 2 Ch. D., 434; 16 Eng. R., 827. (5) Law Rep., 14 Eq., 348; 3 Eng. R.,

<sup>(6) 4</sup> D. J. & S., 380.

<sup>(1)</sup> Law Rep., 17 Eq., 29; 7 Eng. Rep., (4) Seton's Decrees, 4th ed., vol. i, p. 237. 65Ì.

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been legally changed, the town is generally known, at any rate in England, by the old name; and the old name still appears in the best maps. It is not like the Singer Case, where the plaintiff's name had been used. That is an important distinction with regard to the question of fraud.

[Fry, J.: I am disposed to think that in the whole get-up of your goods there has been an attempt to make them like

the plaintiffs'.]

We are quite ready to alter the form of our wrappers. But the real question is the use of the word "Angostura," and that we claim the right to use. We began to use it be-

fore the plaintiffs. There was no fraud in this.

Of couse we are not entitled to use the word for the purpose of representing our article as that of the plaintiffs, but we have not done that. Our article is made at Angostura, and our wrappers clearly state who the manufacturer is. No person who uses ordinary care can be deceived. The evidence shows that there are various kinds of bitters known in the trade, and several of them are called by the names of the places where they are made. The fact that the plaintiffs are the sole makers of a particular article does not give them a monopoly of anything else which may be properly described by the same name as that by which their article has become known. There is no representation that our article is that of the plaintiffs. When the public asked for "Angostura Bitters" they did not ask for the plaintiffs' bitters.

[FRY, J.: When you add the fact that the plaintiffs were the sole manufacturers of the article, it is clear that the public meant the plaintiffs' bitters, though this was not actually present to the mind of the purchaser.]

But as soon as it became known that some one else was making "Angostura Bitters," a purchaser must know that in asking for "Angostura Bitters" he will not necessarily

get the plaintiffs' article.

[FRY, J.: The common usage by men of business at the place \*itself after the alteration of name had been [808 made is very material upon the question whether any man of business desiring to act honestly would call his goods "Angostura" after the name had been changed.]

If we are entitled to use the name to describe the same article as that which the plaintiffs make, why not to describe another similar article so long as we do not represent it to be the plaintiffs'? If the plaintiffs claim the name as their trade-mark, they are entitled to the use of it absolutely for the particular article which they make: McAndrew v. Bas-

The plaintiffs have asked too much, and ought, sett (¹). therefore, to fail in this action.

Then, again, they have made misrepresentations in the last wrappers which they have adopted, and this disentitles them to relief: Pidding v. How (\*); Leather Cloth Company v. American Leather Cloth Company (\*); Ford v. Foster (\*); Cheavin v. Walker (\*).

[FRY, J.: This wrapper was introduced after the action had been commenced. Is there any authority that a fraud committed subsequently to the commencement of the action will deprive the plaintiff of his right ?]

The plaintiffs claim the continuous use of a wrapper sub-They have adduced no sufficient evistantially the same. dence of actual deception: Cope v. Evans (\*).

FRY, J., after stating the nature of the case and the change

of the name of the town of Angostura, continued:

Now there has been a great contest as to the effect of that change, that is to say, how far it has taken effect in public usage, that being material with regard to the good faith of Meinhard in adopting the name of Angostura. Upon the evidence before me I come to the conclusion that, in the country itself and among business men, the name of Angostura has gone out of general use, and that the name of Ciudad Bolivar has come into general use, and has supplanted the other name.

I bear in mind that there is evidence that in England the 809] place \*is still more generally called Angostura, but that circumstance does not suffice, as we know that old names often survive at a distance when they are abandoned at the That is a phenomenon place of their most common use. which, as anybody who is at all acquainted with family life knows, often happens with regard to familiar names. Therefore I come to the conclusion that a man of business there, dealing in the ordinary way, would, at the time when Meinhard set up his business there, have described the town as Ciudad Bolivar and nothing else. [His Lordship then referred to some of the other facts and to the granting of the injunction in Trinidad, and continued:

After the granting of that injunction Meinhard assumed the word "Angostura," as the description of the bitters which he sold. It becomes important therefore to consider what was the history of this word "Angostura" as applied to bitters. The original application of the word to the bit-

<sup>(1) 4</sup> D. J. & S., 880.

<sup>) 8</sup> Sim., 477.

<sup>(3) 11</sup> H. L. C., 523.

<sup>(4)</sup> Law Rep., 7 Ch., 611. (5) 5 Ch. D., 850; 22 Eng. Rep., 513.

<sup>(6)</sup> Law Rep., 18 Eq., 138; 9 Eng. R., 689.

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ters of Dr. Siegert was natural, because they were made in the town of Angostura, and it appears from the evidence that after their introduction into England, in 1863, "Angostura Bitters" was used for many years in England as descriptive of them. In fact, I cannot on the evidence come to any other conclusion than that, from the time of their introduction in 1863 down to the present time, the popular name of the plaintiffs' bitters in this country has been "Angostura Bitters." At the same time, it must be borne in mind that the plaintiffs had never adopted the name "Angostura Bitters" in their own description down to the assumption of it by Meinhard in 1874. Therefore the matter stood in this way when the injunction was granted by the court of Trinidad: there was one name which the plaintiffs' firm had put upon their bitters, and there was another name which, at any rate in England, the public had attached to them, and, being restrained to a certain extent in the use of the name which appeared on the plaintiffs' bitters, Meinhard was ingenious enough to adopt the other name by which they were known in the market. After referring to some of the other facts, his Lordship continued:]

This being the history of the proceedings of the two firms, the substantial question which in my opinion arises is this, whether the wrappers used by Meinhard, and the general form in which \*his bitters are made up, have been [810 adopted by him for the purpose of representing that his goods are the goods of the plaintiffs, and whether those wrappers and that general form are calculated to produce that effect. That seems to me to be the main question which

I have to try.

Now, in trying that question, the first step which I have to take is to compare the things themselves. I have them before me, and no one can look at the two articles without seeing a great similarity in their "get up," if I may use that expression. The bottles are of very much the same form and size, the sealing wax is closely alike in color, and in general effect the two articles are exceedingly alike. Then when I compare the wrappers, the intention is brought to my mind irresistibly. [His Lordship referred to characteristics of the wrappers.]

It is true that the letters printed on the wrappers are not identical in form. It is true that Meinhard's wrapper has the words, "Prepared by Teodoro Meinhard" sufficiently apparent upon it, though not very prominently, and that the plaintiffs' wrapper has the words "Prepared by Dr. Siegert." But, notwithstanding this fact, the two wrappers

are so alike that in my judgment the one is calculated to look like the other, and does so. The mere fact that the name of the maker is given is not sufficient to overcome the effect of identity in other respects, as is clear from the authorities. The two cases of Wotherspoon v. Currie(') and Singer Manufacturing Company v. Wilson (') show that the mere presence of the name of the manufacturer is not conclusive that there is no attempt to palm off the goods as those of the rival manufacturer.

Another point which suggests itself to my mind is this: Is there any reason in the nature of things, in the character of the business, or the character of the product, which should produce this community—I might almost say this identity of general form, in the absence of a desire to deceive. such reason has been assigned by any of the witnesses, though I have called the attention of more than one witness to the point, and the defendants' counsel have been unable to give any reason for the community of form, except it be a desire to deceive. It must be borne in mind that the form 811] of these bottles is peculiar. It does not \*appear that, so far as is known to any of the merchants in large business who have given evidence before me, bottles of similar form are used for any other liquor, cordial, or bitter with which they are acquainted. Then, again, there is the fact to which I have already adverted, that by the injunction in Trinidad, Meinhard felt himself constrained to abandon the word "Aromatic," and he at once assumed the use of the word "Angostura," which, as I have pointed out, had been used by the public to describe the plaintiffs' goods at an earlier period. Further than that, I confess I doubt whether the word "Angostura," if it was meant to describe the town, was used bona fide by Meinhard, because I feel that if he had been acting bona fide, he would have used the name "Ciudad Bolivar" for that purpose; and if he asks me to believe that he used the name "Angostura" in 1874 because he was carrying on business in that town, I cannot accept his explanation. I come, therefore, to the conclusion that Meinhard had a design to induce people to believe that the goods sold by him were the goods of the plaintiffs. have had before me certainly one, but as it appears to me, two cases in which a skilled person, desiring to purchase the plaintiffs' bitters, has had supplied to him the bitters made by Meinhard. Further than that, I have had the evidence of several persons who are skilled in these matters that Meinhard's bottles would be likely to deceive them,

<sup>(1)</sup> Law Rep., 5 H. L., 508.

<sup>(9) 2</sup> Ch. D., 434; 16 Eng. R., 827.

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notwithstanding the difference in the name of the maker upon them. I think, therefore, that there is sufficient evidence of actual deception of persons well acquainted with this class of goods.

Then the next point set up by the defendants is this, that there are misrepresentations in the wrapper now used by the

plaintiffs.

I cannot see that there is in fact anything in that wrapper amounting to a fraudulent misrepresentation by reason of which I ought to debar the plaintiffs from any right they would otherwise have. Further than that, it must be borne in mind that these alleged misrepresentations were made, if made at all, in a wrapper not composed till six or seven months after the institution of the action, viz., in October, 1876, and I am at a loss to see how, even supposing that they were fraudulent misrepresentations, they could be a bar to the plaintiffs' right of action. It seems to me that the case of Ford v. Foster (') is decisive on that point. it will \*be recollected there were misrepresentations by the plaintiff which were held by the court to be collateral, that is to say, they were in documents other than the trade-mark which was then in dispute, and in the decision of the Lord Justice Mellish I find these observations (\*): "I am, therefore, of opinion that an action at law could have been maintained in this case. And we are in the same position now as if, before Sir John Rolt's Act, which altered the rule of this court, an injunction had been refused, with leave to the plaintiff to bring an action at law, and that action had been tried and a verdict obtained for the plaintiff, and the plaintiff were now before the court asking for his injunction. Now, is the injunction to be granted or not? It appears to me in this case that the injunction must be granted, unless it can be held that it is a case in which a court of equity would grant an injunction to restrain the plaintiff's action; because it cannot be right, if the plaintiff is allowed to maintain his action, that he should be obliged to bring perpetual actions at law instead of having his injunction in this court." "All the authorities," said his Lordship ('), "tend in that direction, and seem to hold that, if an action at law will lie, there will be a remedy in this court by injunction. Indeed, I do not see what equitable right the defendant could have to restrain such an action. He is simply a person who has committed a fraud himself, and who has no equitable right whatever, and the only de-

<sup>(1)</sup> Law Rep., 7 Ch., 611. (2) Law Rep., 7 Ch., 682. (3) Law Rep., 7 Ch., 683.

cision which can be cited as an authority is Leather Cloth Company v. American Leather Cloth Company ('), where, no doubt, Lord Westbury and Lord Kingsdown appear to say that false representations of this kind might be an answer to a suit in equity. But that was plainly a case where the misrepresentation was in the trade-mark or label itself, and I have carefully read through the judgments of Lord Kingsdown and Lord Westbury, and it appears to me that they had simply that question before them, and they had not at all present to their minds the question which we have to decide, namely, whether a collateral misrepresentation would be an answer to an action at law, and if it be not an answer to an action at law, whether it could be an answer to a suit in equity." Now it does appear to me that if an action had been brought in March, \*1876, for damages for the fraudulent acts of Meinhard in respect of these goods, and had not been tried till November, 1876, it would have been impossible for the defendants to have alleged a fraud by the plaintiffs in October as a bar to the action, and, if it would not be a bar to an action for damages, it cannot be a bar to an action for an injunction.

It was originally suggested that I should restrain the use of the word "Angostura" absolutely, and that was sought by the statement of claim. I took an opportunity of pointing out the difficulty I should have in doing this. plaintiffs have been for many years, so far as it appears, the sole makers of these particular bitters, which have been made according to a recipe possessed by them but never published. Just in the same way Meinhard has a recipe which he has never divulged, which he does not assert to produce the same thing as that which is made by the plaintiffs, but which produces a different bitter. The two are perfectly distinguishable, both in color and taste. say that Meinhard may not, if he can, make a bitter identical with the plaintiffs', and, if he does so, I cannot prevent him from selling it as "Angostura Bitters." It is to be observed that the person who produces a new article, and is the sole maker of it, has the greatest difficulty (if it is not an impossibility) in claiming the name of that article as his own, because, until somebody else produces the same article, there is nothing to distinguish it from. No distinction can arise from using the name of the class so long as the class consists of only one species, for then the name of the species and the name of the class will be the same. Because persons in England have called the actual thing made "An-

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gostura Bitters," the term has been applied to the plaintiffs' make. It is quite true that, to a person who knows that these bitters are made only by the plaintiffs, the use of the term "Angostura Bitters" carries with it a reference to the plaintiffs' make, but the expression is really used to denote the thing itself; that is what it primarily denotes. The reference to the maker only arises when there is superadded to the thought of the thing the thought of the person who makes it; a thought which seldom arises in the mind of the purchaser, who cares nothing about the maker, but only

about the thing which he is buying.

There remains, however, the question whether I can restrain \*the use of the words "Angostura Bitters" [814] when they are used in such a way as to produce the belief on the part of the purchaser that Meinhard's bitters are the bitters made by the plaintiffs. The point has been put very prominently forward on both sides, for Meinhard claims, by virtue of his first use of the words "Angostura Bitters" on his goods, and also by his entering his wrapper at Stationers' Hall before the plaintiffs adopted the use of those words, to be entitled to the exclusive use of the term "Angostura I do not think that claim can be maintained. think that, so far as England is concerned, the term "Angostura Bitters" means a bitter of the kind which is made by the plaintiffs. The bitter made by Meinhard is not of that kind, but is distinct from it. I think, therefore, that when Meinhard used the words "Angostura Bitters," as applied to the bitters which he made, he did so as part of that scheme of fraud of which I have found him guilty. I think I am at liberty to restrain his agents from such a use of those words. I disclaim any intention of binding the world down to one particular meaning of the words "Angostura Bitters," or of preventing the defendants from selling if they can, bitters like the plaintiffs, or from selling any other bitters, but I am entitled to restrain them from deceiving the public. The injunction will, therefore, be to restrain the defendants, their servants and agents, from using the words "Angostura Bitters," or the word "Angostura," on any bitters or other fluids contained in bottles, not made by the plaintiffs, so as to induce the belief that such bitters or fluids are made by the plaintiffs, and further, from selling or offering for sale any bitters or other fluids in the bottles, in the wrappers, and in the general form in which the defendants were selling the bitters called by them "Angostura Bitters" at the commencement of this action, or in any other wrappers or form contrived or designed to repre-25 Eng Rep.

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sent and induce the belief that the bitters or fluids sold by the defendants, and not made by the plaintiffs, are the goods of the plaintiffs. The defendants must pay the costs of the action.

Solicitors for plaintiffs: Stibbard, Gibson & Co.

Solicitor for defendants: L. Hand.

[7 Chancery Division, 815.]

FRY, J., Jan. 16, 17, 18, 19, 21, 22, 1878.

\*SANER V. BILTON.

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[1876 S. 489.]

Landlord and Tenant—Waste—Reasonable Use of Demised Premises—Covenant by Landlord to keep in Repair—Construction—Implied License to enter—Proviso for Cesser or Abatement of Rent—"Inevitable Accident."

Semble, that an injury to or the destruction of demised premises, resulting from the use of them by the tenant in a reasonable and proper manner, having regard to

the class of tenement to which they belong, is not waste.

In a lease of a newly constructed grain warehouse there was a covenant by the lessor that he would during the term "keep the main walls and main timbers of the warehouse in good repair and condition." The lessee entered under the lease and stored grain in it, in (as the court held upon the evidence) a reasonable and proper way. After a short time a beam which supported one of the floors broke, and ultimately the external walls sank and bulged outwards, and the lessor spent a large sum in repairing the premises. In an action by the lessor to recover from the lessee what he had thus expended:

Held, that the lessee had not been guilty of waste:

Held, also, that the lessor was bound under his covenant to put the walls and main timbers in good repair, having regard to the class of buildings to which the warehouse belonged, and not merely to the condition of the particular building:

Held, also, that the covenant implied a license by the tenant to the landlord to enter upon the premises for a reasonable time for the purpose of executing the neces-

sary repairs.

The lease contained a proviso that, in case the warehouse, or any part thereof, should at any time during the term, "be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident," the rent, or a just proportion thereof, should cease or abate so long as the premises should continue wholly or partly untenantable or unfit for use or occupation in consequence of such destruction or damage. During the period in which the lessor was executing the repairs the lessee was excluded from the use and occupation of the whole or a part of the premises, and he claimed au abatement of rent under the proviso:

Held, that the words "inevitable accident" imported something ejustem generis with what had been previously mentioned, and did not apply to that which, though not voidable so far as the lessee was concerned, was not in its nature inevitable, but resulted from the default of the lessor, and that the lessee was not entitled to an

abatement of rent.

THE plaintiff was the owner of a large warehouse in Hull, known as the Crown Warehouse. At the date of the execution of the lease to be presently mentioned, the warehouse 816] had been recently \*built, and it was intended for the storage of grain, and other goods of a similar nature. The defendant, who was a wharfinger, was the first tenant.

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By an indenture dated the 18th of April, 1873, the plaintiff, in consideration of the rent and covenants thereinafter respectively reserved and contained, demised to the defendant the warehouse and an adjoining building, and a quay or wharf in front thereof, from the first of May, 1873, for the term of fifteen years, at a yearly rent of £1,400. There was a proviso that "in case the said warehouse and building, or any part thereof respectively, shall at any time during the said term be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident, then the said yearly rent hereby reserved, or a just proportion thereof, according to the amount of injury which the said premises shall actually sustain, shall cease or abate, so long as the same premises shall continue wholly or partly untenantable or unfit for use and occupation in consequence of such destruction or damage." There was a covenant by the lessor for quiet enjoyment by the lessee "subject to the rent and covenants herein reserved and contained" on his part, and a further covenant by the lessor that he would "from time to time. and at all times during the continuance of the said term, keep the roof, spouts, and main walls and main timbers of the said warehouse in good repair and condition."

Soon after the execution of the lease the defendant entered upon the demised premises, and erected machinery and other appliances, and in August, 1873, he commenced storing grain

there.

On the 28th of December, 1873, one of the beams which supported the upper floor of the warehouse broke. The floor was not then loaded. In February or March, 1874, the east external wall showed signs of sinking and bulging outwards, and a general sinking of the east side of the warehouse appeared. The plaintiff then had the building inspected, and afterwards executed substantial repairs, the whole of the east wall being underpinned. In July, 1875, the west or river wall of the warehouse showed signs of giving way and bulging outwards. The plaintiff laid out a considerable sum in repairs. While the repairs were being executed the defendant was unable to make use of either the \*whole or a part of the premises for the pur- [817 poses of his business, but he continued to pay rent, though he did so under protest, and without prejudice to his rights.

The action was commenced in November, 1876. The plaintiff, by his statement of claim, alleged that "the defendant has from time to time stored on each of the floors grain, seed, and other goods in excess of what is reasonable and proper, having regard to the strength of the buildings and the nature

of the ground on which they stand, which abuts on the river The goods stored have also been improperly distributed over the buildings, so that some floors and parts of floors have from time to time had to bear weights disprotionate to those borne by other floors and other parts of the This has caused an unreasonable strain on the same floors. walls and foundations of the buildings. By reason of such excessive and improper storage the stability of the buildings has been seriously affected, and the walls and foundations have been seriously injured. The plaintiff has already been obliged to expend several thousand pounds in repairs, which would have been altogether unnecessary if the buildings had been used by the defendant in a reasonable and proper manner." It was further alleged that the defendant threatened and intended to continue to store goods in the building in the same way as theretofore. And the plaintiff claimed an injunction and damages.

The defendant, by his statement of defence, denied that he had ever stored goods in the warehouse in an unreasonable or improper manner, and he denied that the buildings had been in any way injured by reason of improper storage on his part. On the contrary, he said that the buildings had been always used by him in a reasonable and proper manner, and that the repairs which the plaintiff had executed were rendered necessary by the originally faulty construction of the buildings, and not by any improper use of

them by the defendant.

And, by way of counter-claim, the defendant said that at the time of the granting of the lease the buildings appeared and were represented by the plaintiff to be of sound construction, substantially built, and fit for use and occupation as a warehouse. The fact, however, was, as the defendant 818] afterwards discovered, \*that the plaintiff had caused the buildings to be constructed in a faulty manner, and that no proper foundations were put in. The injury which afterwards took place was due entirely to the faulty construction of the buildings, and could not have been avoided by any skill or foresight on the part of the defendant, and the defendant claimed an abatement of rent to the amount of £900 in respect of the period during which the buildings were wholly or partly unfit for use and occupation, and damages to the amount of £300 for breach of the plaintiff's covenant to keep the main walls in good repair and condition.

By his reply the plaintiff joined issue on the statement of defence, and denied the statements contained in the counter-

claim. This was the trial.

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Kekewich, Q.C., and Hornell, for the plaintiff: The defendant has used the building unfairly, and has put the corn in heaps. He has no right to destroy the building, and it is waste to do so.

The law applicable to waste is laid down in Williams' Saunders ('); Yellowly v. Gower ('); Corporation of London v. Hedger (\*); Harnett v. Maitland (\*); Queen's College, Oxford, v. Hallett (\*). Any destruction of the property is waste. The defendant says that the building is not of proper strength, but he must not destroy it. There is no implied warranty of fitness for use by the lessor of a house or land, though there is in the case of a furnished house: Smith v.  $Marrable(^{\bullet})$ ;  $Wilson \ \forall . \ Finch-Hatton(^{\circ})$ ;  $Hart \ \forall . \ Wind$ sor (\*); Sutton v. Temple (\*).

[FRY. J., referred to Erskine v. Adeane (10).]

Arden v. Pullen ("); Chappell v. Gregory ("); Murray

v. <u>Mace</u> (13).

Does not the plaintiff's covenant to keep the main \*walls of the building in good repair imply that [819]he is to put them in good repair to begin with?

Murphy, Q.C., for the defendant, referred to Payne v.

Haine (").]

White v. Nicholson ("). The lease amounts to a contract for fair use, but the evidence shows that the building has been unfairly used, and it is just the same as if the damage was malicious. When the defendant saw that the floor would not bear the weight he ought to have desisted. If the building is too weak for the purpose for which the defendant

wants it he should throw up the lease.

Murphy, Q.C., North, Q.C., and Macnaghten, for the defendant: We do not dispute the authority of the cases cited, but we say that the defendant has committed no waste; he has only used the building reasonably and properly in the mode which was contemplated by both parties. Such a use The evidence is not waste, even if it destroys the building. shows that the use has been reasonable according to the nature of the property. We rely also on the plaintiff's express covenant to keep in repair the main walls and timbers of the building: that amounts to a warranty, and obliges

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(*) 12 M. & M., 52.
(10) Law Rep., 8 Ch., 756.
(11) 10 M. & W., 821.
(1) Ed. 1871, vol. ii, p. 644 et seq.
(2) 11 Ex., 274.
(3) 18 Ves., 355.
(4) 16 M. & W., 257.
                                                                (<sup>19</sup>) 34 Beav., 250.
(5) 14 East, 489.
                                                                 (18) 8 Ir. C. L. Rep., 396.
(°) 11 M. & W., 5.
                                                                 (14) 16 M. & W., 541.
(1) 2 Ex. D., 836; 21 Eng. R., 488.
(*) 12 M. & W., 68.
                                                                (15) 4 Man. & G., 95.
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him to put them in good repair if they were not in good repair when the lease was granted: Payne v. Haine; Easton v. Pratt(1). It must be put in that which is a good state of repair having regard to the class of property to which it be-The defendant has done nothing inconsistent with the contract between the parties; there has been no wanton destruction.

With regard to the counter-claim, the defendant is entitled to an abatement of rent, for the words "other inevitable accident" include that which, so far as the defendant's acts are concerned, is an inevitable accident, that which arises from the default of the plaintiff in fulfilling his covenant to keep the buildings in repair.

[Fry, J.: How can the necessary result of the condition

of the buildings be called an "inevitable accident"?

\*The defect was a latent one, and arose from the landlord's own default; the result was "inevitable" unless

he did something to prevent it.

The defendant is also entitled to damages, because the evidence shows that an unreasonable time was occupied in doing the repairs. Indeed, it may be said that any entry by the landlord is a breach of the covenant for quiet enjoyment.

Kekewich, in reply and in answer to the counter-claim: The evidence shows an unreasonable user by the defendant. The test is the condition of the particular building, not the ordinary strength of the class to which it belongs. building was only intended for a light warehouse. plaintiff's covenant to repair does not extend to inherent defects in the building. As to the abatement of rent, the words "inevitable accident" must mean something ejusdem generis with what has gone before; they mean the same thing as an

"act of God": Nugent v. Smith (\*).

[FRY, J., referred to Nichols v. Marsland (\*).]

FRY, J., after stating the facts, continued: The question which arises upon this state of facts is this, Was the injury which the building has sustained due to an improper user by the defendant, as is alleged by the plaintiff, or was it due to the improper construction by the plaintiff? Or, to express it a little more exactly, what I have to consider, according to my view, is this, Did the defendant use the warehouse in a reasonable and proper manner, having regard to the class of tenement of which it was one, that is to say, a grain warehouse of the dimensions which it had? That

<sup>(1) 2</sup> H. & C., 676. (9) 1 C. P. D., 423; 17 Eng. R., 830. (\*) 2 Ex. D., 1; 19 Eng. R., 835.

appears to me to be the question which I have to determine. I think it is proved that a representation was in fact made by the plaintiff that the warehouse would hold (that is, would safely carry and contain) 60,000 quarters of wheat. not appear to me that the evidence as to representations is of serious importance to the decision of the case. upon it only as confirming me in the conclusion to which I have come, that, from the very nature of the building, a person taking it \*would expect to be able to use it [82] for the storage of a large quantity of wheat or other goods. It is said that if the building was used in any manner which produced injury, although that user might have been a proper and reasonable user of the class of tenement to which the building belonged, nevertheless, if it produced the destruction of the tenement or a serious injury to its stability, waste was committed. It appears to me that this proposition is a very serious one, and cannot be maintained without great difficulty. It would be a very serious thing to hold that if a man chooses to construct a house in such a flimsy manner as that the moment, for instance, a bedstead is put up in it the timbers give way, and the house comes down, that coming down of the house resulting from the putting into it of the ordinary furniture required for its occupation would be, on the part of the tenant, waste. Yet the argument of the plaintiff's counsel has gone to that extent. is admitted that no authority can be produced for the proposition, but reliance is placed upon the general expressions in which waste has been defined, such as anything which leads to the destruction of the tenement. If it were necessary for me to determine the point, I should be prepared to hold that no user of a tenement which is reasonable and proper, having regard to the class to which it belongs, is But it is not necessary now to determine that question, because there is in the present case an express covenant by the lessor that he will during the term "keep the main walls and main timbers of the warehouse in good repair and condition." Upon that I make two observations. The first is that, in my judgment, the covenant obliges the lessor to put the main walls and main timbers into good repair and condition, if they were in bad condition when the lessee took the warehouse. The second is this, that the question, what is "good repair and condition," is to be viewed having regard to the class to which the demised tenement belongs, and not with regard to that tenement itself alone. If it were not so, I should be landed in this absurdity. Assuming that the main walls and main timbers

were in bad repair when the lessee took the warehouse, and assuming that the "good repair" is to be construed with regard to the particular subject-matter, good would mean bad, and the covenant to keep in good repair would be sat-822] isfied by keeping the tenement in bad repair. Not only is that opposed to common sense, but, if authority were necessary, it is opposed to the decision in Payne v. Haine ('), where it was held with regard to a house in bad condition, that a covenant to keep it in good condition required that it should be put into good condition, which would not be the case if the covenant were read with reference to the condition of the demised tenement itself. [His Lordship then reviewed the direct evidence as to the defendant's user of the property, and continued:]

Weighing the evidence as best I can, I come distinctly to the conclusion that the defendant did use the warehouse in a reasonable and proper manner. Nay, I go further, and say that I believe he attended with great propriety to suggestions made by the plaintiff that the danger was caused by the manner in which he was loading, and did his best to load rather lightly than over much. [His Lordship then re-

ferred to the indirect evidence, and continued:

If I were bound to come to a conclusion on this conflicting evidence, I should find for the defendant and not for the plaintiff. It is enough, however, for me to say that, reviewing the whole of the evidence, and having given to it the best attention I can, I have come to the conclusion that the injury which the building has sustained may well be attributed to other causes than an improper user by the defendant, and I cannot come to the conclusion that the defendant has used it improperly.

The result is, that the plaintiff, having taken upon himself the burthen of showing that the defendant has, by his mode of using the warehouse, committed waste, has in my judgment failed to support the burthen, and consequently his

action must be dismissed with costs.

There remain two other questions which are raised by the counter-claim. The first of them arises in this way: The plaintiff has done entensive repairs, the execution of which has occupied a considerable time. The result was that for four months the defendant could not take any goods into the warehouse; and besides that, portions of the warehouse which the defendant would otherwise have used, were for a 823 further period occupied by the \*plaintiff's workmen, and the warehouse therefore could not receive the defend-

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ant's goods, and for this he claims an abatement of rent under the proviso in the lease. He says that the injury so happening to the building was an inevitable accident within the meaning of the proviso, and consequently that he is entitled to an abatement of the rent.

Now it is to be observed that the words "inevitable accident" are coupled with the word "other," which seems to show to some extent that they are to be construed by the rule of ejusdem generis, that is, the inevitable accident pointed at is one of a kind similar to "flood, fire, storm, or tempest." referred to in the earlier words. In my opinion. the injury sustained by the building was not an inevitable accident within the meaning of those words. I think that the words do not apply to anything arising from the acts or defaults of either of the contracting parties. Those acts and defaults were made the subject of express covenant. the words do not apply to things existing at the time of the contract, or to the natural result of things existing, which were known or might have been known to the contracting parties, and further than that, it is obvious from the very words that they do not apply to a thing which is evitable or avoidable. It is to be an "inevitable accident," but here the accident, according to the defendant's own case, might have been avoided if the building had been properly constructed, and consequently it was not an "inevitable accident." It is said that "inevitable accident" includes that which was not evitable by the acts of the defendant. do not think that is the real meaning. The clause is, I think, intended to apply to matters outside the existing state of things, and outside the acts and defaults of the contracting parties. That being so, I determine that the defendant is not entitled to any abatement of rent in respect of the occupation of the warehouse by the plaintiff for the execution of the repairs.

The second question is this: it is said that, over and above that loss, the defendant has been put to other loss in consequence of the occupation of his warehouse for the repairs done by the plaintiff, and that he is entitled to be paid for it. It is to be borne in mind that there is an express covenant that the lessor shall keep in good repair and condition the main walls and the main timbers. \*I have con- [824 strued that covenant to mean that he shall put them into good condition if necessary, and in my judgment that covenant carries with it an implied license to the lessor to enter upon the premises of the lessee, and to occupy them for a reasonable time to do that which he has covenanted to do.

25 Eng. Rep.

and which he has not only covenanted to do, but which he has a right to do, because he has an interest in being allowed to perform his covenant. It is said that the time occupied was unreasonable, but of that I have no evidence. It is further said that the construction of the covenant, as carrying with it an implied license to enter, is inconsistent with the lessor's covenant for quiet enjoyment. I do not think it is, and for this reason, that the covenant for quiet enjoyment, if read as absolutely unqualified, is as inconsistent with an entry on the warehouse for a single moment as it is with an occupation for a month or a year. The mere sending a man in to do the repairs would be a technical breach of the covenant, if it was construed as absolute and unconditional. But that, in my opinion, is a thing which the plaintiff has a clear right to do, for otherwise he could not perform that which he has covenanted to do. Therefore I think the covenant for quiet enjoyment must be read as subject to the license which I have held to be implied in the covenant to The result is that the defendant fails in his counterclaim, and I dismiss it with costs.

Solicitors for plaintiff: Gregory, Rowcliffes & Rawle, agents for E. S. Wilson, Hull.

Solicitor for defendant: A. R. Oldman, agent for Lowe, Moss & Moss, Hull.

As to rights and duties of landlord to tenant while making repairs, see 14 Eng. Rep., 545 note; 23 id., 101 note.

The landlord generally retains the right to go upon the premises for the purposes of examing what waste or injury, if any, has been committed by the tenant or other person, first giving notice of his intention to do so; but strictly he would have no such right unless he reserves it in the lease, for

every unauthorized entry upon land, whether an injury be inflicted or not, amounts to a trespass: Taylor's Landlord and Tenant, § 174.

A tenant has the right to enter the

A tenant has the right to enter the portion of a building outside of his own premises, and make repairs necessary to the enjoyment of his premises: Coddington v. Dunham, 35 N. Y. Superior Ct. Rep., 412; Lampman v. Milks, 21 N. Y., 508.

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[7 Chancery Division, 825.]
FRY, J., Jan. 23, 24, 1878.

### \*Saunders v. Dunman.

[825]

[1875 S. 6a.]

Mortgagor-Costs of Administration-Charge-Salvage Payment.

A mortgagor who has taken out letters of administration which were necessary to perfect the title to the mortgaged property, is not therefore entitled to be paid out of the mortgaged property the expenses of so doing.

Shearman v. British Empire Assurance Company (1) explained.

This action was brought by the assignee of a mortgage against the trustees of the will under which the mortgaged fund was derived, against the personal representative of the mortgagor and his wife, and against the trustees of a creditors' deed made by the mortgagor; and the claim was for foreclosure and payment of the mortgaged fund. The only important question argued was whether the representative of the mortgagor, who had taken out certain letters of administration, was entitled to be paid out of the mortgaged property the expenses so incurred, the letters of administration being necessary in order to perfect the title of the mortgagee. The facts are fully stated by Mr. Justice Fry in his judgment.

Kekewich, Q.C., and G. Woods, for the plaintiff.

Cookson, Q.C., and Langworthy, for the defendant Thirza Dunman, the representative of the mortgagor and of his wife, asked to be paid the costs of the administrations. This money must be treated as paid at the request of the mortgagee, who could not have obtained the fund unless letters of administration had been taken out. At all events, the probate duty must have been paid, and is a charge on the fund: Bliss v. Putnam(\*); Barraud v. Archer(\*). The mortgagee cannot take the benefit without the burden. These payments are in the nature of salvage, and form a first charge upon the fund: Shearman v. British Empire Assurance Company('); West v. Reid (').

\*[Fry, J., referred to Clack v. Holland (\*).] [826] This is perhaps not a charge, but it is clearly incident to

the property, and cannot be avoided.

Fischer, Q.C., and N. Lawrence, for the trustees of the creditors' deed.

(1) Law Rep., 14 Eq., 4.

(\*) 7 Beav., 40. (\*) 2 Sim., 433.

<sup>(4) 2</sup> Hare, 249. (5) 19 Beav., 262.

FRY, J.: In this case I have two questions to determine. In the year 1843 John Talbott made his will, by which he gave one-fifth of his residue to his daughter, Mary Budden, for life, with remainder to Elizabeth Talbott Saunders and - Sarah Talbott Saunders. The testator died in 1844. beth Talbott Saunders died an infant and unmarried, and under the terms of the will her share of the residue went over to her sister, Sarah Talbott Saunders. Sarah Talbott Saunders subsequently married John Dunman, and on the 30th of June, 1865, whilst Mary Budden was living, Mr. and Mrs. Dunman executed a mortgage to a certain Edward Saunders of various properties, including the one-fifth share of Mrs. Dunman under the will of John Talbott. contains the usual covenants by John Dunman, and amongst them a covenant for further assurance. That deed was not acknowledged, and if it had been acknowledged, it does not appear to me that the validity would have been increased, as Mrs. Dunman was a married woman incapable of conveying absolutely her contingent reversionary interest in this fund.

On the 1st of December, 1865, Mr. Dunman executed a creditors' deed. The effect of that deed was to vest all his property in the defendants W. H. Dunman and W. K. Wait, but it is clear that under that deed and the general law then in force, he had the ultimate interest in his estate in the event of there being any surplus after paying the creditors.

In 1868 Mrs. Dunman died, and in the following year Mary Budden died, and thereupon the fund fell into possession in the sense that the husband was entitled, on taking out administration to his wife, to become the owner of that 827] fund. Accordingly, in \*the year 1873, Mr. Dunman took out administration to his wife, and in so doing necessarily incurred certain expenses, and made certain payments. He died in March, 1876, and the defendant Thirza Dunman subsequently took out letters of administration to John Dunman, and afterwards to Mrs. Dunman. She is now, therefore, the legal personal representative of John Dunman and of his wife.

This action is brought by Joseph Saunders, the assign of Edward Saunders, the mortgagee under the mortgage of 1865.

The first question which arises for determination is this: The plaintiff has made defendants to the action Dunman and Wait, the trustees of the creditors' deed, and the plaintiff says that he is entitled to make them responsible for the Fry. J.

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costs of the action in the event of the mortgaged fund not being adequate to pay his principal, interest, and costs.

[His Lordship then referred to the facts, coming to the conclusion that there had never been a demand by the plaintiff which had been resisted by the trustees of the deed, and that he could therefore not make them personally responsi-

ble for the costs.]

The next question is entirely different. As I have already mentioned, John Dunman, in 1873, took out letters of administration to his deceased wife; and Thirza Dunman, or those whom she now represents, have for a considerable period of time set up and insisted that the expenses which were incurred by John Dunman in taking out these letters of administration must be paid by the mortgagee of the fund. They ask not only that the actual probate duty may be allowed them, but that the costs incident to these letters of administration, and the costs of Thirza Dunman in taking out administration to Mrs. Dunman should also be paid out of the fund. Those three claims Thirza Dunman has advanced; and she was made a defendant in consequence of her advancing those claims, and they have been advanced at the bar.

I confess that I have had some difficulty in comprehending what the precise ground of the claim was, but I think I shall not mistake if I say that the claim has been put on three grounds. In the first place it has been said that by the contract itself all that the mortgagee could get is the fund after payment of these administration expenses. inquiry then is, what did John \*Dunman assign by He and his wife assigned "All that the the deed of 1865. said one-fifth part or share of the remainder of the said residuary estate so given and bequeathed to the said Sarah Talbott Dunman by the said recited will of the said John Talbott, deceased, as aforesaid (subject nevertheless to the life interest therein of the said Mary Budden), and all interest which may hereafter become due for the same, and all benefits and advantages to arise therefrom, and all right, title, interest, property, claim, and demand whatsoever both at law and in equity of them the said John Dunman and Sarah Talbott his wife, or either of them, into, out of, or upon the said legacy, or any part thereof." It is said that this is an assignment only of John Dunman's interest in the fund, and that his interest in the fund is the fund after payment of the probate duty. But it has not been shown to me that the probate duty is a charge upon the fund, and in terms it

is clear that what he assigns is the entire fund and all his interest in it, not all his interest in the fund.

In the next place it is said, and said truly, that taking out letters of administration was a sine qua non of John Dunman's getting the fund; that his assigns could not get the fund except through him; and that what is a sine qua non to the title is equivalent to a charge upon the fund on which And accordingly I am referred to cases that title exists. which have proceeded on the ground that legacy duty and succession duty, at all events, are charges upon the fund. Now it is not attempted to be shown to me that by any statute this probate duty is made a charge upon the fund. Mr. Cookson says his argument is equally good whether it is or is not a charge, and he puts it upon the equality of a condition sine qua non and of a charge. I am of opinion that the two things are essentially different. A charge constitutes an actual deduction from a fund; but something without which the fund cannot be got is not a necessary charge upon the fund, it is optional with the person who is entiled to the fund whether he performs that condition or not, whereas the charge is not optional. And the difference is very material for this purpose, because the present plaintiff, not being subjected to a charge, had in his election whether to get the fund or not. He did not perform the condition which was requisite to get the fund; but somebody else, 829] namely, John Dunman, \*did perform it, he being, by virtue of the mortgage, the creditors' deed, and the bankruptcy law, entitled to any possible residue of the fund after satisfying the prior charges of the mortgagee and of the It may or may not be probable that anything creditors. would result to him out of the fund, but he had an ultimate contingent interest, and being so interested he thought fit to satisfy the condition, without which he could not get any-The two things are in my opinion essentially difthing. ferent.

Then it is said that I must import from the circumstances a request from the mortgagee to the mortgagor to perform the condition, and that I must treat the money paid by the mortgagor as money paid to the use and for the benefit of the mortgagee at his request. It is not suggested that in fact there was such a request; but it is said that from the circumstances I must imply a request. The circumstances, to which I have already referred, show that I could not imply it, for the person who made the payment derived a possible benefit from making these payments, and I cannot measure the extent of that benefit. There is, therefore,

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ample ground upon which he, not being a stranger to the fund, might make a payment for his own possible benefit, which payment enured undoubtedly to the benefit of those persons who had prior charges on the fund. A mortgagor having an equity of redemption, or an ultimate interest in the fund, and improving that fund by the performance of some condition without which he cannot get it, does not, in my opinion, by performing that condition create a charge in

his own favor as against his mortgagee.

I was referred to two cases which undoubtedly appear at first sight somewhat to support the contention. The cases are West v. Reid (') and Shearman v. British Empire Assurance Company (\*). It is enough for me to say that in neither of these two cases does it appear to me that the point for which they were cited to me was the subject-matter of discussion and decision. In West v. Reid the point in controversy was abandoned at the bar. In Shearman v. British Empire Assurance Company an offer had been made, which was not withdrawn from, and upon which the Master of the Rolls acted. It is quite true that he makes an observation there that it was salvage, but looking at his previous decision in Clack v. \*Holland(') I very much doubt [830] whether his Lordship meant to determine that question. Certainly that point does not appear to have been argued, the question for argument being whether a person who had made a salvage payment was entitled to the entirety of the fund; and an offer having been made to give the defendant the portion of the fund which represented the actual payment, and that offer apparently never having been with-drawn, the case was decided on that ground. Those are authorities, therefore, which do not appear to me to sustain the proposition for which they were cited.

I come, therefore, to the conclusion that the claim set up by Thirza Dunman was ill-founded; that she having been brought here to litigate that claim, and being unsuccessful, I must direct her to pay so much of the costs of the plaintiff in the action as they have been increased by that claim.

Solicitors for plaintiff: Dangerfield & Blythe, agents for

Symonds & Son, Dorchester.

Solicitors for defendants: Whites, Renard & Co., agents for Henry Brittan & Co., Bristol; Lewis, Munns & Longden, agents for Marshfield & Hutchings, Wareham.

<sup>(1) 2</sup> Hare, 249.

<sup>(9)</sup> Law Rep., 14 Eq., 4.

<sup>(3) 19</sup> Beav., 262.

Linoleum Manufacturing Company v. Nairn.

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[7 Chancery Division, 830.] Fry, J., Jan. 28, 1878.

#### ROBERTS V. EVANS.

[1877 R. 62.]

Parties-Misjoinder-Husband and Wife-Action for Separate Estate-Costs-Rules of Court, 1875, Order XVI, rr. 1, 2, 13.

Since the Judicature Acts, as before, a married woman suing to recover separate estate ought to sue by a next friend, making her husband a defendant.

In an action of this kind the husband was made a co-plaintiff. The defendant by his statement of defence objected that the husband ought to have been a defendant. The statement of claim was afterwards amended for another purpose, but no alteration was made as to the parties.

At the trial the court ordered the husband to be made a defendant, and, in giving judgment for the wife, deprived her of the costs of the pleadings subsequent to the time when the defendant took the objection.

## [7 Chancery Division, 834.] FRY, J., Jan. 30, 1878.

#### 834] \*Linoleum Manufacturing Company v. Nairn.

[1876 L. 278.]

Trade-mark-Patent-Name-New Substance.

Where the inventor of a new substance has given to it a name, and, having taken out a patent for his invention, has, during the continuance of the patent, alone made and sold the substance by that name, he is nevertheless not entitled to the exclusive use of that name after the expiration of the patent.

This was an action to restrain the use of the word "Lino-

leum" as applied to floor-cloth.

A Mr. Walton obtained several patents, the last and principal being in 1863, for preparing floor-cloth by means of a certain solidified or oxidized oil, to which he gave the name "Linoleum," and the floor-cloth made by him therewith had been called and known as "Linoleum Floor-Cloth" and apparently also as "Linoleum." The word "Linoleum" had not been previously used, and was a fancy name invented by Mr. Walton, and the substance itself appeared to have been new. In 1864 the Linoleum Manufacturing Company, the plaintiffs in this action, was formed, and took assignments of Mr. Walton's patents and rights. The floor-cloth made by the company had been extensively used, and no one else had hitherto made or sold Linoleum, or Linoleum Floor-Cloth. The patent of 1863 had now expired, and the defendants R. Nairn and M. B. Nairn, who were floor-cloth manufacturers, proposed to make and sell Lino-

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leum Floor-Cloth, calling it by that name. This action was brought to restrain them. The details of the case are

sufficiently stated in the judgment of his Lordship.

Dickinson, Q.C., and Millar, for the company: proprietor of a trade-mark has a right to protection, first, because it is his own property, and, secondly, because it has been used by him and is known to be his. The word "Linoleum" was invented by Walton, and has been for fifteen years used exclusively by him and his assigns: Leather Cloth Company v. American Cloth Company (1). It is an essential part of his trade-mark, and \*indicates who [835] is the maker of the goods. If the plaintiffs called it "Walton's Floor-Cloth," that would not be a sufficient description, and the word "Linoleum" is essential. Singer Manufacturing Company v. Wilson (3) is in our favor. Braham v. Bustard (\*) shows what is the effect of a name. No doubt the defendants have added their name to their trade mark, but that is not enough, and they have no right to use the word "Linoleum." It is true that hitherto the plaintiffs have had a monopoly, but there is no reason why a patent and a trade-mark should not subsist together.

Hastings, Q.C., and Lawson, for the defendants.

FRY, J.: [His Lordship stated the facts as to the patents, and observed that down to the present time nobody else had made and sold either "Linoleum" or floor-cloth made of "Linoleum." But it appeared that the sole manufacture by Mr. Walton and those claiming under him was due entirely, or to a large extent, to the existence of the numerous patents, the effect of which was to give Mr. Walton and those who claimed under him a monopoly in the manufacture and sale of this Linoleum Floor-Cloth. It was therefore not surprising that the name by which Mr. Walton designated the compound had been applied exclusively to the manufacture of Mr. Walton and those who claimed The case of the plaintiffs was that they had a trade-mark, and that the essential, or one of the essential and material terms of that trade-mark was the word "Linoleum," and that this had been taken by the defendants. His Lordship then described the trade-marks, and expressed his opinion that "F. Walton's Patent" was the most conspicuous part of the trade-mark used by the plaintiffs, and that the word "Linoleum" appeared to be used only as descriptive, and was not an essential part of the trade-mark; and that the defendants' trade-mark contained their own

<sup>(1) 4</sup> D. J. & S., 137; 11 H. L. C., 523. (8) 2 Ch. D., 434; 16 Eng. R., 827. (8) 1 H. & M., 447.

Fry. J.

name much more conspicuously than the word "Linoleum," and was quite dissimilar from the plaintiffs' trade-mark.

His Lordship then continued:

But it has been argued that this case comes within the second \*class of cases to which the Master of the Rolls referred in Singer Manufacturing Company v. Wilson ('), and that the word "Linoleum" from the user which had been made of it must mean the goods manufactured by the plaintiffs, and that therefore to take the word "Linoleum" and use it, was to assert that the goods so sold and made were made by the plaintiffs, and that any user of the word "Linoleum" was a fraud not in a moral point of view, but in the point of contemplation of this court. The argument is that there was a misrepresentation, the misrepresentation consisting in alleging by the use of the word "Linoleum" that the goods were made by the plaintiffs, when in fact they were made by the defendants. It will be observed that the inquiry with regard to the use of the word "Linoleum" as a constituent element in the trade-mark, and the inquiry as to the use of the word "Linoleum" as a misrepresentation are one and the same inquiry, and I must consider what the word "Linoleum" meant as used at the time when the defendants intended to attribute it to their manufacture.

In the first place, the plaintiffs have alleged, and Mr. Walton has sworn, that having invented a new substance, namely, the solidified or oxidized oil, he gave to it the name of "Linoleum," and it does not appear that any other name has ever been given to this substance. It appears that the defendants are now minded to make, as it is admitted they may make, that substance. I want to know what they are to call it. That is a question I have asked, but I have received no answer; and for this simple reason, that no answer could be given, except that they must invent a new name. I do not take that to be the law. I think that if "Linoleum" means a substance which may be made by the defendants, the defendants may sell it by the name which that substance bears.

But then it is said that although the substance bears this name, the name has always meant the manufacture of the plaintiffs. In a certain sense that is true. Anybody who knew the substance, and knew that the plaintiffs were the only makers of this substance, would, in using the word, 837] know he was speaking of a \*substance made by the plaintiffs. But, nevertheless, the word directly or primarily means solidified oil. It only secondarily means the manu-

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facture of the plaintiffs, and has that meaning only so long as the plaintiffs are the sole manufacturers. In my opinion. it would be extremely difficult for a person who has been by right of some monopoly the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article. admitted that no such case has occurred, and I believe it could not occur; because until some other person is making the same article, and is at liberty to call it by the same name, there can be no right acquired by the exclusive use of a name as showing that the manufacture of one person is indicated by it and not the manufacture of another.

Those are the observations which have occurred to me upon a mere statement of the plaintiffs' case, and how are they confirmed or shaken by the evidence in the case? [His Lordship then referred to the articles of association, the advertisements, and the patents taken out by the company, as showing that they used the word "Linoleum" merely as descriptive of the substance, and looked on the words "F. Walton's Patent" as the essential part of their trademark. His Lordship then continued: I come, therefore, to the conclusion upon the facts as they are presented to me, and notwithstanding the evidence to which my attention has been drawn on the part of the plaintiffs, that the word "Linoleum" did bear that meaning which Mr. Walton put upon it, namely, solidified or oxidized oil; that solidified or oxidized oil may be made by the defendants if they are minded to make it; and if they are minded to call it by the only name which it bears, I think they are at liberty so to If I found they were attempting to use that name in connection with other parts of a trade-mark, so as to make it appear that the oxidized oil made by the defendants was made by the plaintiffs, of course the case would be entirely different.

Then what are the authorities to which my attention has been called upon this part of the case? That which is most near to the \*present case is Braham v. Bustard('). [838] In that case the plaintiffs had invented a white soft soap, which the court found to be a new article of commerce. Having so invented it they were minded to describe it in a manner which should distinguish their manufacture, and they gave to it an additional name, calling it "Excelsior White Soft Soap." There the word "Excelsior." having Gretton v. Mees.

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no relation to the subject-matter, and being a purely fancy name, was held by the Vice-Chancellor to be intended to discriminate one particular species of soft soap, and accordingly the word "Excelsior" was protected. Now here, as I pointed out, the plaintiffs having invented, or their predecessors in title having invented, a new subject-matter, use merely the name distinguishing that subject-matter, but do not use a name distinguishing that subject-matter as made by them from the same subject-matter as made by other The two cases are essentially different. pears to me, therefore, that there has been neither infringement of any essential part of the plaintiffs' trade-mark nor any attempt on the part of the defendants to represent the goods which they intended to sell as goods made by the plaintiffs.

The plaintiffs' case has therefore, in my judgment, failed,

and I dismiss the action with costs.

Solicitor for plaintiffs: S. Potter.

Solicitors for defendants: Wild, Barber & Browne.

[7 Chancery Division, 839.]

FRY, J., Feb. 4, 1878.

\*Gretton v. Mees.

[1877 G. 106.]

Concluded Agreement-Agent-Acceptance-Repudiation-Payment into Court-Costs.

The plaintiffs claimed £37 from the defendant for the use and occupation of a house, and authorized him to pay the amount to a person whom they named. She called on the defendant, and he then expressed his readiness to pay the amount, but she (having also an interest in the property) refused to receive it. No actual tender The plaintiffs sued the defendant for the use and occupation, claiming The defendant paid £37 into court:

Held, that as soon as the defendant expressed to the agent his readiness to pay the £37 there was a concluded agreement between him and the plaintiffs for that amount,

and that the plaintiffs could not recover more:

Held, also, that the defendant was entitled to the costs of the action from the time

of the payment into court.

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This was an action for damages for the use and occupation of a public house called the Greyhound, at Bethnal Green, for three months, from the 24th of June to the 28th of September, 1876. The writ was issued on the 30th of April, 1877. William Parker and Arthur Cates, two of the plaintiffs, were the legal owners of a leasehold interest in the property for a term which expired on the 29th of September, 1876. The plaintiff Mrs. Gretton and two others of

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the plaintiffs were the owners of the reversion, subject to the term vested in Parker and Cates, and they had agreed to assign to Mrs. Gretton and her co-reversioners their claim for dilapidations against their underlessee. The defendant had been in possession of the property under an underlease, which expired on the 24th of June, 1876. The plaintiffs claimed £238. By his statement of defence, delivered on the 14th of June, 1877, the defendant alleged that there had been an express contract between Parker and Cates and himself that he should pay the sum of £37 2s. 3d. for the use and-occupation for the period in question. On the 11th of June, 1877, the defendant paid £37 2s. 3d. into court in satisfaction of the plaintiffs' demand.

This was the trial of the action.

It appeared that on the 18th of September, 1876, the solicitors \*of Parker and Cates gave notice to the defend- [840] and that they were entitled to the rent for the three months in question, and required payment to be made by him. The defendant placed the matter in the hands of his solicitors, and they, on the 21st of September, wrote to the solicitors of Parker and Cates, asking what amount of rent was claimed for the three months. On the 23d of September the solicitors of Parker and Cates wrote to the defendant's solicitors as follows:—

"The amount of rent claimed by our clients is £37 2s. 3d. Will you send us a check for the amount, or shall we have to apply to Mr. Mees direct?"

On the 25th of September they wrote again to the defendant's solicitors as follows:—

"We have to-day given to Mrs. Gretton (the person entitled to the freehold of the above premises on the falling in of the original lease on the 29th inst.) a note to the tenant authorizing payment of the rent claimed by our clients to her. We shall, therefore, not have to communicate with you further upon the subject. Mrs. Gretton will to-day see the tenants of the houses where we have served the notices."

Mrs. Gretton called at the public house on that day and saw the defendant, and produced to him the note from the solicitors of Parker and Cates. He then told her that he was ready to pay the sum claimed. She, however, refused to receive it, and said that she should require more. No actual tender was made to her. The plaintiffs afterwards refused to receive the £37 2s. 3d., and ultimately the action was commenced.

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Cookson, Q.C., and E. E. Witt, for the plaintiffs: Our title is not disputed; the only question is as to the amount

of damages.

North, Q.C., and Maclean, for the defendant: As soon as the defendant expressed to Mrs. Gretton his willingness to pay the £37 demanded by the plaintiffs there was a concluded agreement between him and them, and they cannot now demand more. Mrs. Gretton was their agent to receive 841] the defendant's \*acceptance, but she had no authority to repudiate, and her repudiation cannot prevent the defendant's readiness to pay from being an acceptance of the plaintiffs' terms, and thus concluding a bargain.

Cookson, in reply: When Mrs. Gretton repudiated the proposed terms there could be no acceptance. She did not go to the defendant to receive the £37, but to demand more. He was dealing with her, not as a mere agent, but as a person who had an interest in the property. At any rate, there

ought to have been a tender of the money to her.

FRY, J.: The question is, whether the express contract which is alleged by the defence has been proved. Was there or was there not a concluded agreement between Parker and Cates, who were the persons legally entitled to make the demand for the use and occupation during the three months, and the defendant? In my opinion there was. They had made a demand upon the defendant, and they authorized the payment to be made to Mrs. Gretton, whom they armed with authority to receive the money. At the interview with her on the 25th of September the defendant expressed his readiness to pay the amount claimed. It was, in my opinion, immaterial that she intimated her determination not to accept that amount; that was entirely outside the authority which she possessed, which was only an authority to receive payment of the sum claimed. I therefore hold that the express contract which is alleged has been proved, and I give judgment for the plaintiffs for the sum which has been paid But the defendant must have the costs of the action from the time of the payment into court.

Solicitors for plaintiffs: Burgoynes, Milnes & Co. Solicitors for defendant: Martineau & Reid.

The moment the minds of the parties Bishop on Contracts, § 174; 1 Cowen's meet and assent to a contract it is com- Ar., 3d ed., 60.

plete, and neither is at liberty to be off:

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[7 Chancery Division, 842.]
FRY, J., Feb. 5, 1878.
\*COLLETTE V. GOODE.

**[842]** 

[1876 C. 417.]

Practice—Pleading—Defence—General Denial followed by Particular Denial—Amendment at Trial—Rules of Court, 1875, Order XIX, rr. 17, 18, 20, 22; Order XXVII, rr. 1, 6—Copyright—Registration—5 & 6 Vict. c. 45, 88, 18, 24.

In an action for damages for an alleged infringement of the plaintiff's copyright in a song, the defendant, by his statement of defence, alleged that the song had not been registered at Stationers' Hall until the 9th of December, 1876, and added, "the defendant denies that the song has been duly registered. The time of the first publication thereof is not truly entered on the register:"

Held, that on this pleading the defendant was only entitled to prove that the time of first publication had been untruly entered, and that he was not at liberty to prove

that the name of the publisher had been untruly stated.

Held, also, that leave to amend the statement of defence, so as to raise the latter point, ought not to be given, even though by the plaintiff's own evidence at the trial it for the first time appeared that the name of the publisher had been untruly entered in the register.

[7 Chancery Division, 848.]

FRY, J., Feb. 7, 8, 9, 11, 12, 1878.

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**F848** 

[1876 B. 581.]

Trade Name—Name of Place—Imitation—Fraud—Injunction—Evidence of Deception,

The plaintiff was the owner of and worked all the collieries in the parish of R. in Somersetshire, and owned all the coal in that parish, with a small exception. She carried on the business of working the collieries and selling the coal in her own name, adding to it on her wagons and bill-heads the words "R. Collieries." The defendants, from 1868, carried on at R. the business of coal merchants as the "R. Coal Co.," having depots at various railway stations in the south and west of England, at which they sold different kinds of coal. They became in 1876 the lessees of and worked a colliery outside the parish of R., but in a district or basin in which coal was raised similar to that raised within the parish, coal raised in the district, but outside the parish, being known in the market as R. coal. In 1873 the defendants began to sell coals at G. in Surrey, by means of a local agent, and in 1875 they bought the good-will of a retail coal dealer named C. at G., who had become bankrupt. They then advertised themselves in the Surrey newspapers, and otherwise in the neighborhood, as "The R. Colliery Proprietors and Factors, Coal and Coke Merchants (late C. & Co.)," and offered to supply coal of every description direct from the collieries:

Held, that the defendants were not entitled to use the name "The R. Colliery Proprietors," unless and until they should acquire a colliery within the parish of R., or to use any style implying that their coal came from the parish of R., unless and until they should become authorized to sell coals raised from a colliery within that parish:

Held, also, that, the acts of the defendants being calculated to induce purchasers to believe that the defendants were selling the plaintiff's coal, it was not necessary for the plaintiff to prove any instance of actual deception, or any actual damage.

THE plaintiffs in this action were Messrs. C. B. Braham and W. S. Braham, and the Dowager Countess Waldegrave (the wife of the defendant Lord Carlingford), suing by a next [849] friend. \*The defendants were W. Beachim and T.

Gullick, and Lord Carlingford. The plaintiffs, Messrs. Braham, were the trustees of the marriage settlement executed in 1863, of the Countess, under which she had an absolute power of appointment by deed or will over (inter alia) all the seams of coal and all coal mines and collieries situate within the parish of Radstock, in Somersetshire (except the coal lying under the glebe land in that parish, which the Countess was entitled to work under an agreement with the rector of the parish, and except also the coal lying under about an acre of land in the parish which belonged to a company called the Writhlington Coal Company), and, subject to that power and to some mortgages, these seams of coal, coal mines, and collieries, were vested in the plaintiffs, the Messrs. Braham, for an estate during the life of the Countess, in trust for her separate use. At the time when the action was commenced, the plaintiffs' seams of coal were being worked by them by means of five pits or collieries, known as Old Pit, Middle Pit, Ludlow's Pit, Wells' Way Pit, and Tyning's Pit. There were no other pits within the parish of Radstock. The seams of coal, however, which were found in the parish extended beyond its limits, the whole district or basin (including the parish) in which these seams were found being known as the Radstock District or Basin. The seams were worked outside the parish by means of nine other pits or collieries, some of the coal raised throughout the district being known in some of the markets in the west of England as Radstock coal.

Prior to 1848 some of the plaintiffs' colleries were worked by lessees, who carried on business under the name of the Radstock Coal Company, and were commonly called the Old Radstock Company. The other pits of the plaintiffs were worked by other lessees. In 1848, on the expiration of the leases, the Countess took the working of her collieries into her own hands, and she afterwards continued to work them herself down to the time when the action was commenced. For some years prior to and down to 1873, the Countess in carrying on the business described herself on her bill-heads, and on the wagons which she used, as the owner of the five pits, naming them, adding her own name, and the title "The Radstock Coal Works."

850] \*The defendants Beachim and Gullick, in the year 1868, commenced trading in partnership at Radstock as

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"The Radstock Wagon Company." They afterwards added the business of coal merchants, and they then assumed the name of "The Radstock Coal and Wagon Company," describing themselves particularly in the coal business as "The Radstock Coal Company." In the year 1873 the Countess complained that letters addressed to the Radstock Coal Company, and which were really intended for her, were delivered by the post office to the defendants. The defendants, on the other hand, asserted that the letters so addressed were intended for them. The matter was referred to the post office authorities, who decided that letters addressed to "The Radstock Coal Company" must be delivered to the defendants. After this the Countess adopted a new style in her business, using on her bill heads the words "The Right Honorable the Countess Waldegrave's Radstock Collieries," and putting a similar description upon her wagons.

In the year 1873 the defendants Beachim and Gullick commenced selling coals wholesale at Guildford, in Surrey, by means of an agent there named Franks. In September, 1875, they purchased the good-will of the business of a retail coal dealer at Guildford named Cookson, who had become bankrupt, and they then commenced carrying on a retail business as coal dealers there, Franks being their manager. They commenced using, upon the blind in their office window and in advertisements which they caused to be inserted in the local newspapers and railway time-tables, the style of "The Radstock Colliery Proprietors." The following is a specimen of the newspaper advertisements:—

"THE RADSTOCK COLLIERY PROPRIETORS AND FACTORS, COAL AND COKE MERCHANTS.

Offices for this District:
48 High Street, Guildford,
(Late W. Cookson & Co.)
Supply direct from the Collieries

Wallsend, Silkstone, House, Welsh, Steam and Kitchen Coals Of every description, at lowest prices, especially for cash.

Special contracts made for quantities at any station on the South \*Western Railway, the South Eastern, the London, Brighton and South Coast Railway, the Great Western, or the London, Chatham, and Dover Railways.

Chief Offices: RADSTOCK, SOMERSET."

This advertisement appeared in the West Surrey Times and other papers from December, 1875, to December, 1876.

On the office blind the defendants put up, in June, 1876, the words, "The Radstock Colliery Proprietors, Coal and 25 Eng. Rep. 8

Coke Office;" but in October, on complaints being made by the plaintiffs, they altered this to "The Radstock Coal Company, Colliery Proprietors, Coal and Coke Office."

The plaintiffs made further remonstrances, and ultimately

the action was commenced.

The defendants became, in 1876, the lessees of a colliery, called the Old Welton Pit, situate in the Radstock district, but outside the parish of Radstock, which they then worked. They had, however, in 1875, described themselves on a board put up at their depot at the Guildford Railway Station as "The Radstock Coal Company, Colliery Proprietors, Coal and Coke Factors."

The plaintiffs alleged that the use by the defendants of the name "The Radstock Colliery Proprietors" was a colorable imitation of the name "The Radstock Collieries" used by the plaintiffs, and that it was calculated and intended to mislead persons intending to buy coal from the plaintiffs into buying coal from the defendants under the belief that they sold the plaintiffs' coal. And the plaintiffs claimed an injunction to restrain the defendants from using the name

of "The Radstock Colliery Proprietors."

By their statement of defence the defendants Beachim and Gullick relied upon the fact that coals raised in the Radstock district, though not in the parish of Radstock, were known as Radstock coals, and said that they had never used the name of "The Radstock Colliery Proprietors" except in connection with their Guildford business, and then only with the addition of the words "late W. Cookson & Co." They denied that they had infringed any right of the plaintiffs, or that any persons wishing to deal with the plaintiffs [852] had been misled. They said that they \*did not threaten or intend to use the name of "The Radstock Colliery Proprietors," but that they did intend to use names implying that they were the proprietors of collieries or coal mines at Radstock, and insisted that they were entitled to But they said that they did not intend, and never had intended, to use any name which would import that they were selling, or authorized to sell, coals raised from the plaintiffs' collieries at Radstock. And they said that, inasmuch as the coal sold by them was the same as that sold by the plaintiffs, there would be no deception of purchasers, even if they used the same name as the plaintiffs.

This was the trial of the action. The plaintiffs did not prove any instances of actual deception of persons who had

intended to purchase coals from them.

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Lock, for the plaintiffs, referred to Singer Manufacturing Company v. Wilson ('); Seixo v. Provezende ('); Edlesten v.

Edlesten ('); Wotherspoon v. Currie (').

Bagshawe, Q.C., and E. Cutler, for the defendants Beachim and Gullick: No harm can be done to the plaintiffs at Guildford; the action is really a quia timet one, because they think we may extend the use of the words "The Radstock Colliery Proprietors" to other places. But there is nothing to show any intention on our part to do so. We have, however, a right to use that description. We are lessees, i.e., proprietors of a colliery in the Radstock district, and we sell coal which is known as Radstock coal. There is no representation that our coal is that of the Countess's.

[FRY, J., referred to Dent v. Turpin (\*).]

It is known that there is a class consisting of proprietors of collieries at Radstock; no one could suppose that the defendants represented themselves to be the owners of all the collieries there. Seixo v. Provezende is really in our favor, and so are Colonial Life Assurance Company v. Home and Colonial Assurance Company (\*), \*Singer Manufac- [853 turing Company v. Wilson ('), and Siegert v. Findlater ('). In Wotherspoon v. Currie (') there was express evidence of fraud. Raggett v. Findlater (') shows that a word in its nature common cannot be regarded as part of a trade-mark or description. Cope v. Evans (') is very like the present case, and is an authority in our favor on the question whether actual deception must be proved. Dent v. Turpin (") was only a decision on demurrer as to parties.

Walter Ball, for Lord Carlingford.

FRY, J., after stating some of the facts, and referring to the change of name adopted by the Countess in 1873, continued:

Now, it does appear to me that when the Countess had directed that change, with the evident design of getting out of the way of the name or style which the defendants had adopted, there was cast upon them, as honest and honorable men, the obligation not to endeavor to follow her in the steps she had so taken to avoid confusion. They ought to have leaned rather in the direction of difference than in the direction of similarity.

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(1) 2 Ch. D., 484; 16 Eng. R., 827.

(2) Law Rep., 1 Ch., 192.

(3) 1 D. J. & S., 185.

(4) Law Rep., 5 H. L., 508.

(5) 2 J. & H., 139.

(6) 33 Beav., 548.

(7) Ants, p. 21.

(8) Law Rep., 17 Eq., 29; 7 Eng. R., 653.

(9) Law Rep., 18 Eq., 138; 9 Eng. R., 689.

(10) 2 J. & H., 139.
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[His Lordship then stated some others of the facts, and, referring to the board at the Guildford Station used by the

defendants in October, 1875, said:]

It does not appear to me that the defendants were then entitled to describe themselves as colliery proprietors, because I think that expression means the lessors, lessees, or workers of colleries. But they did use the words "Colliery Proprietors," and the question is whether this description of themselves was calculated and had a tendency to deceive? I do not say it would have been by itself deceptive; but I think, considering how the Countess had given up the words "Coal Works," really in order to take herself out of the description which the defendants had thought fit to use, it was an indiscreet thing, to say the least of it, for them to follow on her heels.

854] \*[After referring to the defendants' advertisement

above stated, his Lordship said:]

Now, that appears to me to be a representation that the Radstock Colliery Proprietors, having their chief office at Radstock, are the persons who had acquired the business of Cookson & Co., having an office at No. 48 High Street, Guild-I should have thought, on reading it, that those persons were proprietors of a colliery or collieries at Radstock, and, more than that, that they were entitled to describe, and did consider themselves, as the principal colliery proprietors It is, I think, clear that any person reading at Radstock. that advertisement might suppose that the supply came from those colleries, because the words are, "Supply direct from the collieries Wallsend, Silkstone, House and Kitchen Coals," which last are exactly what the Radstock coals are. Further than that, it holds out that special contracts for quantities may be made at any of the railway stations mentioned for the supply of coal from the collieries, which I should think, at any rate, include the collieries at Radstock. Therefore, it appears to me that the defendants, by that advertisement, held themselves out as desirous to carry on their business at any of the numerous stations on the lines of railway therein mentioned.

I cannot help, therefore, coming to the conclusion that they intended to hold themselves out as the Radstock Col-

liery Proprietors, who supplied coals from Radstock.

Having now stated the facts of the case, it becomes necessary to consider the nature of the defence, because it appears to me that the Countess, as the sole owner of the collieries

in the parish of Radstock, is, therefore, presumably alone entitled to call herself "The Radstock Collieries Proprietor,"

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and to restrain any person from infringing or interfering with her right. The case for the defendants is this: It is said, and said truly, that there is in this district a series of beds of coal, which I have already referred to as the Radstock series, and that, wherever they are, there is the Radstock That is true to a large extent. It is true that, at any rate until you reach a fault on the north, wherever the basin is worked there is found the Radstock coal. that, although not at the pit's mouth and in the immediate neighborhood, nor in the Bath markets, still in many markets in the south \*and west of England, the whole of [855] that coal is known as Radstock coal. It is said that wherever there is Radstock coal there are Radstock collieries. But that does not entitle the workers of that coal to call themselves owners of the collieries at Radstock or "Radstock Colliery Proprietors." It does not follow that, wherever the Radstock coal is found, the workers of it are entitled to describe themselves as "The Radstock Colliery Proprietors," or as the owners of colleries at Radstock.

In this case there are two things to be considered; first, the use of the expression "The Radstock Colliery Proprietors." It appears to me that that expression must mean one of two things. It must either mean all the colliery proprietors who work in the Radstock basin, or it must mean the plaintiff as being, par excellence, the person owning and working the Radstock collieries. I have had both those views put before me by the defendants' witnesses. them said that, in the year 1871, when the proprietors of collieries in the district combined together—I believe in support of, or opposition to, a railway—they were spoken of as The Radstock Colliery Proprietors," and that was the only time he knew the expression to have been used. If that be so, it is far from clear to me that the plaintiffs are not entitled to bring this action, because if the expression included the whole of those proprietors, it certainly included the Countess, who was by far the largest of them, for the evidence shows that more than half the coal sent from Radstock station is raised from her collieries. In this view the use of the words would certainly amount to a declaration by the defendants that they were selling the coal of all those proprietors, and, therefore, selling the plaintiffs' coal. It appears to me that by the title of "The Radstock Colliery Proprietors" the defendants represented themselves to be the proprietors of the Countess's collieries, and there is no doubt that she has a right to restrain them from doing that. does the wrong appear to me to be any the less from the

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fact that there are other collieries in the Radstock basin or district.

Mr. Bagshawe contended that the use by the defendants of the generic name or title of Radstock Colleries could not entitle the plaintiffs to maintain an action. But it must not be forgotten that the genus includes the species, and that, if you assume the genus, you assume all the species, and then, 856] by adopting the name \*which they did, the defendants represented themselves as selling the coals of the plaintiffs and other persons, which come under the description of Radstock coal. That, I think, is wrong. The other view is, that if you speak of "The Radstock Coal Proprietor," or proprietors, everybody would consider it meant the Countess Waldegrave; and for this reason, that she alone has for many years worked the Radstock coal in Radstock parish, and she is undoubtedly the largest worker and shipper of coal in the district. If that be true, a wrong has undoubtedly been done by the defendants.

I think, therefore, that they were wrong in describing

themselves as "The Radstock Colliery Proprietors."

The next matter to be inquired into is this: The defendants expressly claim the right to describe themselves as the proprietors of collieries or coal mines at Radstock. Now, with regard to that, it appears to me there is a great distinction between Radstock Colliery (which may mean a colliery in the district) and a colliery at Radstock, because that, in my opinion, means a colliery within the parish of Radstock, and I do not believe that the parish has given its name to all the collieries in the Radstock series.

The plaintiffs, therefore, in my opinion, are entitled to restrain the defendants from trading under a description which represents that the coals they are selling are raised at

Radstock, that is, from the works of the Countess.

It has been pressed by the defendants' counsel that there is no evidence of damage in this case. In the first place, I am of opinion that it is not necessary to prove damage where the thing done by the defendants has, in the opinion of the court, a tendency to enable them to deceive by selling as the plaintiffs' their own goods. I am of opinion that in this case there is a tendency to deceive, and that proof of special damage is not necessary, as was determined by Lord Hatherley in *Dent* v. *Turpin* ('). Then it is said that it is ridiculous to suppose that any harm can arise to the Countess at Guildford, where no one thought of buying her coal. But I must conclude that the defendants adopted this title for

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some adequate motive, and what that motive could be, but to introduce their goods into the market at Guildford, I do not know. I have this in evidence, however, that so far back as the \*year 1870, the predecessors of the de- [857 fendants, Cookson & Co., applied to the Countess to be appointed agents for the sale of her coal at Guildford, and that offer was refused, on the ground of the break of gauge between the Great Western and South Western Railways. Since then, however, that difficulty has been removed, and it is now possible to send Radstock coal by railway direct to Guildford. Further than that, I cannot help observing that the defendants' advertisement does not confine itself to Guildford, but professes to deal in coal at all those stations which are on the lines of railway mentioned.

I cannot, therefore, refuse the plaintiffs relief, on the

ground of want of proof of damage actually accrued.

In my judgment, the two expressions to which I have referred, namely, the description of the defendants as "The Radstock Colliery Proprietors," and as the owners of collieries at Radstock, are both of them unjustified, because they are both calculated to deceive, by enabling the defendants to sell, as and for coal raised by the plaintiffs, coal raised by themselves.

I must, therefore, grant an injunction, in the terms which I will mention, and I give the plaintiffs the costs of the action. The plaintiffs will pay Lord Carlingford's costs, and

add them to their own.

The injunction will be, To restrain the defendants, unless and until they shall acquire a colliery or coal mine within the parish of Radstock, from trading under or using the name or style of "The Radstock Colliery Proprietors," or any other name or style signifying that the defendants, or either of them, are proprietors of any colliery or collieries at Radstock; and to restrain the defendants, unless and until they shall become authorized to sell or supply any coals raised or gotten from any colliery or coal mine within the parish of Radstock, from using any style or name signifying or implying that the defendants are selling or supplying, or are authorized to sell or supply, any coal raised or gotten from any colliery or coal mine within the parish of Radstock.

Solicitor for plaintiffs and for Lord Carlingford: J. R. Macarthur, agent for Rees-Mogg, Son & Davy, Cholwell, Temple Cloud.

Solicitors for defendants Beachim & Gullick: Vallance &

Vallance, agents for Murly & Sons, Bristol.

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[7 Chancery Division, 858.]

FRY, J., Feb. 15, 1878.

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\*EDWARDS V. WEST.

[1876 E. 116.]

Fire Insurance—Option to purchase—Landlord and Tenant—Conversion.

Under the terms of a lease the landlord covenanted to insure, and the tenant had the option to purchase for a fixed sum. Before the time for exercising the option, the buildings demised were burnt, and the landlord received the insurance money. The tenant then exercised his option to purchase, and claimed the insurance money as part of his purchase:

Held, that, under the circumstances, the tenant had no claim to the insurance

onev.

The principle of Lawes v. Bennett (1) is not to be extended.

Reynard v. Arnold (2) distinguished.

By an indenture dated the 29th of September, 1870, made between the defendant, C. West, of the one part, and the plaintiffs, W. Edwards and W. D. Edwards, of the other part, the defendant demised to the plaintiffs a paper-mill at Burghfield, in Berkshire, with a dwelling house, and appurtenances, and also six cottages and their gardens, and the machinery in the mill, for twenty-one years, at the yearly rents of £400 for the mill, £350 for the machinery, and £50 for the cottages, payable by quarterly payments. And the defendant thereby, for himself, his heirs, executors, and administrators, covenanted with the plaintiffs, their executors, administrators, and assigns, amongst other things, that the defendant, his heirs and assigns, would, at his and their own expense, insure, or cause to be insured, the mill, dwelling house, gasworks, cottages, and all other buildings thereby demised, and also the plant, machinery and fixtures, from loss or damage by fire, in some insurance office, in the sum of £14,000 at the least, and would for that purpose pay, or cause to be paid, the premium or premiums, or other sums of money which might be necessary for keeping every such insurance on foot; and that in case of any loss or damage by fire not exceeding £4,000 happening to the said mill, cottages, buildings, machinery, and fixtures so insured, or any part thereof, all moneys which should be received from time to time \*under or by virtue of any such insurance as aforesaid, should be forthwith laid out and applied in or towards the rebuilding, repairing, or reconstructing the said mill, buildings, cottages, machinery and fixtures, or such part thereof as should be destroyed or damaged by

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But it was thereby provided that in case the damage by fire as aforesaid should exceed the sum of £4,000, then and in such case the said term should cease and be at an end as and from the day of the happening of such fire; the defendant, for himself, his heirs and assigns, covenanting with the plaintiffs, their executors, administrators, and assigns, to immediately refund the proportion of the rent which might have been paid in advance beyond the day of And it was also agreed that in case the plaintiffs, their executors, administrators, or assigns, should, before the 29th day of September, 1875, be desirous of purchasing the mill and premises, and the fee simple and inheritance thereof, together with the machinery and fixtures, at the the price of £14,000, and of purchasing the cottages, lands. and hereditaments, and the fee simple and inheritance thereof, at the further price of £1,200, and of such their desire should at any time on or before the 25th day of March. 1875, give to the defendant, his heirs or assigns, notice in writing of such desire, then and in such case the plaintiffs. their executors, administrators, or assigns, should be entitled to become the purchasers of the said hereditaments and premises, and the fee simple and inheritance thereof, and the machinery and things at those prices respectively; and the purchase was to be completed within six months after the notice was given. And it was further provided that in case the plaintiffs, their executors, administrators, or assigns, should be desirous of purchasing the said mill and premises, with the machinery therein, at the sum of £14,000 as aforesaid, but not of purchasing the other hereditaments at the sum of £1,200, they should be at liberty to do so.

In the month of September, 1875, negotiations began between the plaintiffs and the defendant as to enlarging the time for exercising the option to purchase; and in the month of April following a letter was written by the defendant, which, as the plaintiffs contended, enlarged the time to the

29th of September, 1876.

On the 6th of May, 1876, a fire occurred at the mill, and the \*defendant received, under his insurances from [860 the insurance offices, nearly £12,000 for the damage. On the 28th of September, 1876, the plaintiffs gave the defendant notice that under the terms of their lease they intended to purchase the mill and hereditaments for £14,000, and to claim the sums of money received from the insurance offices for the damage.

The defendant refused to sell upon those terms, and the 25 Eng. Rep. 9

plaintiffs brought this action, claiming to be entitled to purchase the mill, buildings, machinery and fixtures, and the cottages, for £14,000 and £1,200; and that the defendant might be declared a trustee for the plaintiffs of the insurance money, which must be treated either as part of the purchase-money or as belonging to the plaintiffs.

The action now came on for trial, and his Lordship, after argument, decided in favor of the plaintiffs, that, on the construction of the lease, the option to purchase continued, though the term had been put an end to by the happening

of the fire.

Cookson, Q.C., and E. S. Ford, for the plaintiffs, then contended that the option, when exercised, related back to the time of the agreement, since which the property had been partially converted into personalty by the fire and the receipt of the insurance money; and that the purchaser was entitled to it in that shape: Lawes v. Bennett('); Townley v. Bedwell ('); Weeding v. Weeding ('); Collingwood v. Rew ('); Drant v. Vause ('). Those cases were between the heir and the executor, but the same principle must apply between vendor and purchaser. No injustice can be done here. The vendor contracted to sell the mill for a fixed sum, and ought not to be a gainer by the fire. The property has been converted, and the insurance money, like rent, goes with it. If not, the vendor had no insurable interest. Unless the lessee was to have the benefit of the insurance money, why did the lessor covenant to insure for £14,000? He was only bound to spend £4,000 in case of a fire, and why did he bind himself to the exact sum of £14,000, except to compensate the purchaser? Moreover, in fact \*it was the lessees who insured, as it would be out of the rent that the premiums were paid: Reynard v. Arnold (\*). The lessor received the money merely as an indemnity, and it belongs to the purchasers.

North, Q.C., and Whitehorne, for the defendant, as to the right of the tenant over money paid for damage by fire, cited Leeds v. Cheetham ('); Lofft v. Dennis ('); Poole v.

Adams (\*). They were stopped by his Lordship.

FRY, J.: The plaintiffs in this case allege that the option of purchase which was given by the lease of the 29th of September, 1870, to be exercised by a notice given on or before the 25th of March, 1875, and to be carried into comple-

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(1) 1 Cox, 167.
(2) 14 Ves., 591.
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<sup>(\*) 14</sup> Ves., 591. (\*) 1 J. & H., 424.

<sup>(4) 3</sup> Jur. (N.S.), 785; 26 L. J. (Ch.),

<sup>(5) 1</sup> Y. & C. Ch., 580.

<sup>(6)</sup> Law Rep., 10 Ch., 886. (7) 1 Sim., 146.

<sup>(8) 1</sup> E. & E., 474. (9) 33 L. J. (Ch.), 639; 12 W. R., 683.

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tion on or before the 29th of September, 1875, was enlarged by subsequent correspondence, that by virtue of that correspondence a new contract was constituted under which the 29th of September, 1876, was substituted for the 25th of March, 1875, and that the option was exercised on the 28th of September.

I will assume, for the purpose of the present judgment, that the plaintiffs are correct in that contention. There are, therefore, four dates material to consider; first, that of the contract creating the option; secondly, that of the injury to the premises; thirdly, that for the exercise of the option; and fourthly, that for the completion of the purchase ac-

cording to that option.

Now the point which I am about to decide arises from the payment of a sum of between £11,000 and £12,000 by the insurance offices to the defendant consequent upon the injury to the property by fire on the 6th of May, 1876. The plaintiffs contend that that money so received by the defendant was received by him as part payment of the £14,000, which the plaintiffs, under the option, were bound to pay; and that contention has been supported by three methods of

argument.

In the first place, it has been said that by the law of England \*the exercise of the option causes it to relate [862] back to the time of the creation of the option in such a manner as to render the property for this purpose property of the purchaser as from the date of the contract which gave the option; so that here, although the option was given by a contract made in April, and not exercised till the 28th of September, yet that when it was so exercised on the 28th of September, it operated retrospectively, and made the property the property of the purchaser as from the month of April preceding, and consequently made the vendor trustee of the fruits of the property for the purchaser. Now it appears to me that such a conclusion would be highly inconvenient, because it would place a person under the obligations which rest upon a trustee, or make him free from them, by reference to an act which was not performed until a future day; and the retrospective conversion of a person into a trustee of property is a result eminently inconven-In the next place, the argument appears to me to be opposed to the general course of authority and principle. According to the view which I conceive to be true, the conversion of property, which means the treating it as belonging to somebody else before it has been actually transferred to that other person, results from a contract which can be

specifically enforced; so that where there is no specific performance of contract possible, there is no conversion. flows in effect from the principle of equity which considers that done which ought to be done, and which the court can compel to be done, and it extends so far back as those circumstances exist, and no farther. In other words, where there is a contract capable of being specifically enforced as from the date of that contract, and neither earlier nor later, the property comprised in the contract is deemed to belong to the purchaser, and the money to be paid is deemed to belong to the vendor, because those two things ought to be done; but here there is no obligation to do them at any earlier date than that of the contract constituted by the exercise of the option. The conversion cannot, according to the principle, relate back to an earlier date than the contract which gives rise to it. I refer to the case of Haynes v. Haynes (') as an authority for that general principle, and it appears to be important.

863] \*Upon that general principle, then, I should hold that the argument is untenable. But, then, I am told that the case is covered by authority, and for that purpose my attention is very properly drawn to the cases which begin with Lawes v. Bennett (\*), and which show that where there is a contract giving an option to purchase real estate, and the option is not exercised till after the death of the person who created the option, nevertheless the produce of the sale goes as part of his personal estate, and not as part of his real estate. Now, whether Lawes v. Bennett is or is not consistent with the general principle upon which conversion has been held to exist, it is not for me to say. It is enough for me to say that the case has been followed in numerous other cases, though it has been observed upon by more than one judge as somewhat difficult of explanation. I think that the language of Lord Eldon in Townley v. Bedwell (\*), and of Vice-Chancellor Kindersley in Collingwood v. Rew (1), shows that they were not satisfied that that case was consistent with the general principles which were applicable to cases of conversion; and therefore, although I should implicitly follow Lawes v. Bennett in a case between the real

and personal representatives of the person who granted the option, I do not think that I am at liberty to extend it so as to imply that there is conversion from the date of the contract giving the option as between the vendor and the purchaser who claim under it. It is to be borne in mind that

<sup>(1) 1</sup> Dr. & Sm., 426.

<sup>(2) 1</sup> Cox, 167.

<sup>(8) 14</sup> Ves., 591,

<sup>(4) 3</sup> Jur. (N.S.), 785.

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no authority can be produced which has extended the doctrine of Lawes v. Bennett in the slightest degree beyond what was decided in that case. The principle, whatever it be, has never been applied except as between the real and the personal representatives of the original creator of the option, and I for one shall not extend it, because I think that it is limited by the general principle to which I have adverted. Therefore, upon that ground, I hold that there is no conversion of the estate from an earlier date than the 28th of September, when the notice was given. The fire having taken place, and the insurance money having been received at an earlier date, the intended purchaser has no right, upon the general principles of conversion, to assert a title

to that money.

\*In the next place, it has been argued, upon the [864] head of what I may call general equity, that it is reasonable, and right, and fair that the purchaser, the person who has the benefit of the option, should be entitled to use it so as to get the money, and that argument has been pressed upon me mainly by reference to the case of Reynard v. Arnold ('). When that case is looked at, I think it will be found to furnish no authority in the present case. The plaintiff there was lessee with an option of purchase. The lease provided that he should pay rent down to the time of the completion of his purchase. By the lease the plaintiff covenanted to insure in the sum of £800, and it was agreed that the moneys recovered under that insurance should be applied in reinstating the premises. Now, it is to be observed that both landlord and tenant in that case had an interest in the reinstatement, the landlord because it improved his property whether he did or did not become subject to the option, the lessee because he was bound to pay rent for the premises whilst the lease continued, and also because he had the option to purchase the premises for a definite sum. happened was this: The lessee performed his duty, and insured for £800; the lessor, without the knowledge of the lessee, went to another insurance office and insured in another sum. In both these policies there were the usual average The effect of this was that the lessee could only recover part of the £800, and that the lessor would recover The lessor said, "I will keep the other the other part. part in my pocket." In other words, he said this: "I am at liberty to diminish the money which by contract between you and me you are to acquire for our common benefit, and I am at the same time at liberty to receive an exactly equiv-

<sup>(1)</sup> Law Rep., 10 Ch., 386; 23 W. R., 804.

whole case.

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alent sum myself, and not to apply that to the purpose to which you and I contracted that the entire sum should be applied." He said, "I cut your money down by the doctrine of contribution, and yet I do not apply the sum which I receive under that doctrine as a contribution to the common fund for the restoration." The Lords Justices said that that was inequitable, and I do not think that it requires a very great stretch of reason to see that it was very inequitable. The money in the lessor's pocket was the measure of the injury 865] which the lessor had done \*to the lessee by diminishing his right to receive under his policy. That case does not apply here.

The third ground upon which it has been argued is that of express contract. Of course, if I could find any express contract that the lessor should insure for the benefit of the lessee or the possible purchaser, I should give attention to that argument; but where is it to be found? What I find is that the lessor agreed to insure in the sum of £14,000. That is not the amount which the purchaser was to give for the property. He was to give £15,200 for the entire property, and the insurance covers the entire property. If the premises were damaged to an extent not exceeding £4.000. then the term was to continue, and the lessor was to lay out the moneys which would be received under that insurance in or towards the restoration of the premises—to that extent there was a contract with regard to the application of the insurance money—but if the damage caused by the fire should exceed £4,000, then the term was to cease. There is no stipulation whatever with regard to these insurance moneys except in one contingency, namely, fire causing damage of less than £4,000. In that event the parties have said what was to be done with the money; as to every other event they have maintained absolute silence. It is said that I am therefore to infer that there was a contract that the money should be held for the benefit of the possible pur-I do not think that I can draw that inference from that silence, and I think that when we look at the nature of the option we see that there is no hardship whatever in not drawing such an inference. When a fire happens which causes damage amounting to more than £4,000, the lessee is released from his obligation to pay rent, and then he has this question to ask himself. Is it worth my while to buy the premises, or is it not worth my while? If it is worth his while to buy them at the price fixed upon, he buys them;

if it is not worth his while, he leaves them. That is the

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I therefore assume that the plaintiffs are right in the construction of the agreement, but I determine that they are wrong upon the contention with regard to the insurance moneys. As I understand, in that contingency they prefer to have the bill dismissed, and it must be dismissed with costs, subject to an observation as to one paragraph in the statement of claim.

\*His Lordship ultimately ordered the costs occa- [866 sioned by charges made in that paragraph to be borne by

the defendant.

Solicitors for plaintiffs: Rowley, Page & Rowley. Solicitors for defendant: Pearce & Son.

See 17 Eng. Rep., 614 note.

If there be a stipulation in a deed, or in another instrument not merged in it, that the vendor may retain possession of the premises for a time, and shall then deliver them to the vendee, the premises are at the risk of the vendee, and he must sustain the loss, if any, by fire or other casualty: Mott c. Coddington, 1 Abb. Pr., N.S., 290, 1 Rob., 267.

At a judicial sale the accepted bidder is entitled to his purchase, however much the property may appreciate in value between the sale and confirmation; and the purchaser is bound by his purchase, although from accidental causes the property may in the mean time become impaired or depreciated in value; by fire or otherwise: Vance v. Foster, 9 Bush (Ky.), 389.

See contra, Aspinwall v. Balch, 4 Abb. N. C., 193, 7 Daly, 200; Mutual, etc., v. Balch, 4 Abb. N. C., 200; Terpenning v. Agricultural Ins. Co., 14 Hun, 299.

And see Woehler v. Endler, 46 Wisc., 301; Stimson v. Arnold, 5 Abb. N. C., 577, and cases cited in note; Peck v. Knickerbocker, etc., 18 Hun, 183.

So on an absolute contract for the sale of land, authorizing the purchaser to take immediate possession, the premises are at his risk; McKechnie c. Sterling, 48 Barb., 330, 334; Gates c. Smith, 4 Edw. Chy., 702; McLaren c. Hartford, etc., 5 N. Y., 151; Lombard c. Chicago, etc., 64 Ills., 477.

But where, in the case of an executory contract for the sale of real estate, the vendor was to furnish an abstract of title, and if not satisfactory he was to have the option of perfecting

the title, or annulling the contract and returning the money paid, and the abstract failed to show title and the vendor failed to exercise his option, after notice so to do, until after valuable and costly buildings thereon were destroyed by fire, the vendor still remaining in possession; it was held on bill by the vendee for specific perform-ance as to the land and compensation for the buildings and property destroyed, and exemption from the payment of interest during the time the vendor was in default, that the contract of sale lacked that completeness which would, in equity, make the land the property of the vendee, so as to make him bear the loss, it being subject to a contingency; and that, upon specific performance being ordered, the vendee was entitled to compensation for the loss, to be deducted from the purchase-money; and that the vendor was entitled to interest on the unpaid purchase-money only from the time a good title to the property was shown, the vehdor being entitled to the rents and profits up to such time: Lombard

o. Chicago Sinai Congregation, 64 Ills., 477; see second appeal, 75 Ills., 271. Plaintiff agreed to convey to defendant, and defendant agreed to purchase, a lot of land with all the buildings and improvements thereon, and between the time of the signing of the contract, and the time fixed by it for the delivery of the deed, the possession, and the payment of the purchase-money, the building on the lot (which constituted its chief value) was destroyed by fire. Held, that defendant might refuse to complete his contract until the building was rebuilt: Wicks v. Bow-

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man, 5 Daly, 225, reviewing many cases.

See also Aspinwall v. Balch, 4 Abb. N.C., 193, 7 Daly, 200; Mutual, etc., v. Balch, Id., 200; Terpenning v. Agricultural, etc., 14 Hun, 299; Bostwick v. Frankfield, 74 N. Y., 207, 214-5.

The plaintiff made a parol agreement for the purchase of a parcel of land with a duciling house thereon of

The plaintiff made a parol agreement for the purchase of a parcel of land with a dwelling house thereon, of the defendant, and paid the purchasemoney, taking a written receipt that it was paid for the estate, the defendant undertaking to procure a discharge of a mortgage on the estate, and which

he accordingly did, but before a deed was given or tendered to the plaintiff the house was destroyed by fire. It was held, that the payment did not take the contract out of the statute of frauds, and that the plaintiff was entitled to recover back the money, on the ground of a failure of the consideration.

Held also, that in such case, general indebitatus assumpsit was a proper form of action: Thompson v. Gould, 20 Pick., 134, and see case between same parties for rent, 4 Metc., 224.

[7 Chancery Division, 866.]

FRY, J., Feb. 23, 25, 1878.

LEES V. PATTERSON.

[1876 L. 198.]

Pleading—Set-off—Counter-claim—Specific Statement of Facts relied on—Rules of Court, 1875, Order XIX, rr. 3, 4, 10—Writ of Ne Ezeat—Damages for improper Issue.

A writ of ne exeat against a defendant was obtained by the plaintiff immediately after the commencement of an action. The defendant was arrested, but was discharged upon payment to the sheriff of the sum for which the writ was marked. By his statement of defence the defendant alleged that the writ had been improperly obtained, and claimed damages for his arrest, and at the trial he insisted upon this claim:

Held, that, as the defendant had not moved to discharge the writ, it must be taken to have been properly issued, and, consequently, that the defendant was not entitled to any damages.

The defendant made the allegation that the writ had been improperly issued, and the claim for damages, in one paragraph of the statement of defence, which was numbered consecutively with the others, but was not headed separately as a counter-

Held, that the pleading was good as a counter-claim.

Crowe v. Barnicot (1) distinguished.

(1) 6 Ch. D., 758; 23 Eng. R., 314.

. [7 Chancery Division, 871.]

Fry, J., Feb. 25, 1878.

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\*Spike v. Harding.

[1876 S. 148.]

Confusion of Boundaries—Landlord and Tenant—Duty of Tenant—Action to ascertain Boundaries—Jurisdiction—Practice—Reference to Chambers in Lieu of Commission.

The duty of the tenant of land, immediately adjoining other land of his own, is, not merely to leave the boundary between his own land and his landlord's distinct at the expiration of his term, but to keep it distinct during the term.

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The court has, therefore, jurisdiction during the term to ascertain the boundary if the tenant has confused it.

A reference to chambers to ascertain boundaries directed in lieu of the issue of a commission, further consideration being adjourned and costs reserved.

This action was brought for the purpose of ascertaining the boundaries between land belonging to the defendants and land belonging to the plaintiffs, but occupied by the defendants under a lease granted by the plaintiffs' predecessor in title.

In December, 1854, Mrs. D'Arcy was the owner in fee of a house and land near Lymington, called Home Mead, immediately adjoining to another house and land, called Grove House, of which the Rev. W. H. Thompson was the owner in fee.

By an indenture, dated the 9th of December, 1854, Mrs. D'Arcy, in consideration of the sum of £20, and of the yearly rent of 1s., and of the covenants in the indenture contained, demised to Thompson, his executors, administrators, and assigns, a piece of land adjoining the Grove House property containing thirty-seven perches, and forming part of the Home Mead property, for the term of 500 years from the 1st of June, 1855. The lease contained covenants by Thompson to pay the rent, to put up along the respective sides of the demised land which adjoined other parts of Mrs. D'Arcy's property a substantial park pale-fence, or a wall, and to keep the same in repair to the satisfaction of Mrs. D'Arcy, her heirs or assigns, and a further covenant that Thompson. his executors, administrators, or assigns, "shall not, nor will permit or suffer any trees, shrubs, or plants of any description, which may \*at any time during the said term [872] be standing or growing upon the said piece or parcel of land hereby demised, to grow or extend themselves above the height of seven feet from the ground, without the consent of the said K. L. E. D'Arcy, her heirs or assigns, or in any manner so as to intercept any part of the view from the said messuage, grounds, and premises, and shall and will, upon the request of the said K. L. E. D'Arcy, her heirs or assigns, cut, lop, and trim such trees, shrubs, and plants, or any of them, so as to keep the same within the limit aforesaid; and in case of his or their default or neglect so to do for seven days after any such request shall be made in writing, ... then and so often as the same shall happen it shall

be lawful for the said K. L. E. D'Arcy, her heirs or assigns (without prejudice to her or their remedy under the covenant hereinbefore contained), to enter upon the said demised premises, and to cut, lop, and trim all or any trees, shrubs,

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and plants thereon, so as to keep the same within the limit aforesaid." There was also a covenant by Thompson restricting his right of building upon the demised land.

At the time when this lease was executed there were, close to a part of the boundary line between the land belonging to Thompson and the demised land, a ditch and a bank, and on the top of the bank was a post and rail-fence. Shortly after the execution of the lease Thompson entered upon the demised land, and he removed the post and rail-fence, levelled

the bank, and filled up the ditch.

The plaintiffs were the successors in title of Mrs. D'Arcy; the defendants were the successors in title of Thompson. The plaintiffs alleged that the old ditch was on that side of the bank which adjoined Thompson's land, and that, consequently, the ditch and the bank were the property of Mrs. D'Arcy; and they alleged that Thompson had acted wrongfully and without the consent of his lessor in levelling the bank and filling up the ditch, and that he had thus entirely obliterated the boundary between the demised property and his own. And the plaintiffs alleged that a difference of opinion existed between them and the defendants as to the situation of the boundary. There was a further dispute about another portion of the boundary.

The plaintiffs claimed that an inquiry might be directed, 873] or \*that, if necessary, a commission might issue, for the purpose of ascertaining the boundaries between the premises belonging to the defendants and the demised premises.

By their statement of defence, the defendants alleged that the old ditch was on that side of the bank which adjoined the demised land, and that consequently the ditch and the bank were the property of Thompson.

There were some large elm trees growing on the site of the

old bank.

This was the trial of the action.

It appeared that the plaintiffs had, in 1875, brought an action at law upon the covenant to lop the trees, in which action the jury found that the elm trees were on the defendants' land. A new trial was moved for, but was refused.

North, Q.C., and S. Dickinson, for the plaintiffs: The boundary has been confused by the tenant's act, and the court has jurisdiction to ascertain it: Speer v. Crawter ('); Willis v. Parkinson (2); Wake v. Conyers (1).

Hastings, Q.C., and Whitehorne, for the defendants: The jurisdiction to ascertain the boundaries between the land of a tenant and that of his landlord arises only at the end of

<sup>(1) 2</sup> Mer., 410.

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the term: Attorney-General v. Fullerton (1). In Attorney-General v. Stephens ('), it was assumed, not decided, that the jurisdiction would arise during the term. The plaintiffs ought to show that it is impossible to ascertain the boundaries without the aid of the court.

[FRY, J.: I do not understand what Sir T. Plumer means in Miller v. Warmington (\*). If the court can discover where the boundaries are, any one else can, so that if that is the test. I do not see how there could ever be a case for the interference of the court.

At any rate, no case is shown for the interference of the \*The only substantial question is as to the [874]ownership of the site of the old bank and ditch, so that it is really an ejectment action.

[FRY, J.: The dispute is not limited to that.]

Substantially it is. If it is once determined on which side of the bank the ditch was, the law is clear as to the ownership: Vowles v. Miller (1). The question was really determined in the action on the covenant, and the present action ought to be dismissed with costs: Metcalfe y. Beckwith (\*).

FRY, J.: In my opinion the plaintiffs have shown a case which requires me to give judgment for ascertaining the boundaries of the land. [His Lordship stated the effect of

the lease, and continued:]

Now, before going further, I pause to inquire what are the obligations which Mr. Thompson took on himself by that lease? I cannot state them better than in the words of Lord Eldon in Attorney-General v. Fullerton (\*), where he says: "It has been long settled, and that law is not now to be unhinged, that a tenant contracts, among other obligations resulting from that relation, to keep distinct from his own property during his tenancy, and to leave clearly distinct at the end of it, his landlord's property, not in any way confounded with his own." That obligation, in my opinion, rests on the tenant, not merely at the end of the term when he comes to deliver up the property, but also during the subsistence of the term; and that for several intelligible reasons. the first place, the landlord does not lose his interest in the property during the demise. In most cases he retains rights of an important kind in it. He has the right of distress for the recovery of the rent, and in this particular case the lessor has a right of entry on the land in the event of the covenant to lop the trees not being observed, and therefore it

<sup>1) 2</sup> V. & B., 263. 2) 6 D. M. & G., 111.

<sup>(8) 1</sup> Jac. & W., 491.

<sup>(4) 3</sup> Taunt., 137. (b) 2 P. Wms., 376. (c) 2 V. & B., 264.

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was of great importance to Mrs. D'Arcy that the demised premises should be kept distinct during the currency of the term.

Now, how did matters stand with regard to the boundary at the time of this demise? The common case of plaintiffs 875] and defendants \*is that the two properties were separated from each other by a ditch, but where that ditch ran The plaintiffs say is a matter of controversy between them. that the bank was on Mrs. D'Arcy's side of the ditch; the defendants say that the bank was on Mr. Thompson's side of And there is a further dispute as to another part There is, therefore, abundant controversy of the boundary. between the plaintiffs and the defendants with regard to the true position of the boundary line between them. I should add that it is not disputed that the ditch has been filled up and the bank levelled, and that that was done by Mr. Thompson, under whom the defendants claim.

This, therefore, appears to me to be a case in which the tenant has confessedly broken the obligation or duty which rested on him to keep the boundary distinct during the term. And, stopping there, I think the plaintiffs' case is

clear.

How is the case met? In the first place, it is said that the boundaries can be ascertained. That does not appear to me to be material. If the court was convinced that they could not be ascertained, probably it would not stultify itself by issuing a commission, but it is because there has been a departure from the tenant's duty, and there is a controversy about the boundaries, that application is made to the court. On the evidence, I conclude that no actual physical bound-

arv exists

Then it is said that the bank and the ditch were on Mr. Thompson's land, and that all that has been done was done on his own land. That might well be said if he had not assumed the obligation of a tenant; and it must be observed that, in issuing the commission, I do not say that he was bound to keep up the bank or the ditch; I only say that he ought to have kept either that boundary, or some other boundary, which would render the two properties clearly distinct. I do not say he was bound to keep the then existing boundary, but a boundary.

Then it is said that the circumstances of the case import an intention on the part of both landlord and tenant to permit this confusion. It is said that, looking at the nature of the properties, I must infer that the intention was to permit the demised land to be occupied with the other land, for the

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purpose of adding to the agreeable occupation of the former. That may well be, but still a \*boundary might be [876 kept up. And, so far from the lease importing an intention that the boundary shall not be kept up, it most distinctly imports an intention that it shall, because the lease reserves important rights to the lessor over the demised land, which do not extend to the lessee's own land. I cannot infer from the evidence any consent on the part of the lessor to what has been done.

It has been suggested that the whole matter has been determined in the action on the covenant to lop the trees, but that did not determine the whole controversy, as I have already pointed out. Moreover, as it appears to me, the action itself shows very strongly the necessity for establishing the boundaries, because the question about the trees may arise from time to time, and, until the boundary is definitely settled, it may have to be decided over and over again. So far from justifying the defendants in their resistance to this action, the action on the covenant only shows the great importance to the plaintiffs of ascertaining the ancient boundary. The result is that I must direct the issue of a commission in the usual form.

North: We should prefer an inquiry to a commission. The jurisdiction in an action of this kind is analogous to that in a partition action. Before 1852 the practice in partition actions was to issue a commission, but the modern practice is to direct an inquiry in chambers.

Hastings: We agree that an inquiry will be the more

convenient form.

FRY, J.: If you both prefer that form, I see no objection to it. I can on the further consideration, if necessary, direct the physical boundary to be laid down. I will direct an inquiry in chambers to ascertain the boundaries, adjourning the further consideration and reserving the costs.

Solicitor for plaintiffs: J. E. Coxwell, agent for W. Coxwell, Lymington.

Solicitors for defendants: Hume, Bird & Bird, agents for Moore & Jackman, Lymington.

Woodfall's Landlord and Tenant, 11th Eng. ed., 577; Taylor's Landlord and Tenant, § 179; 1 Sto. Eq. Jur., §§ 99 a, 609-622; Bispham's Eq. (2d ed.), §§ 32, 503; Adams's Eq., 237-8, 380 marg. pp.; Smith's Man. Eq., 391-3; O'Hara v. Ecclesiastical, etc., 11 Irish Eq. Rep., 262; Wake v. Conyers, 1 Edw., 331; 2 White & Tudor's

Lead. Cas. in Eq. (4th Am. ed.), 850, 853-865 note.

Courts of equity in America have, of late years, watched this branch of jurisdiction with a great deal of jealousy: 1 Sto. Eq. Jur., §§ 615, 616, and cases cited; 2 White & Tudor's Lead. Cas. in Eq. (4th Am. ed.), 860-5.

## [8 Chancery Division, 1.] C.A., Jan. 30, 1878.

## 1] \*In re Alison's Trusts and In re Johnsons, Infants.

Infants—Guardianship and Maintenance—Court of County Palatine—Concurrent Jurisdiction.

In 1874, a petition was presented in the Court of the County Palatine of Lancaster for a guardian and maintenance to two infants, who were entitled for life to a very large property under their great-grandfather's will. Their mother and another person were appointed guardians, and an allowance for maintenance was fixed, and was afterwards varied from time to time by the court. In 1877, the mother, as next friend of the infants, obtained in the High Court a judgment for administration of the testator's estate, and then took out a summons in the action for the appointment of guardians and an allowance for maintenance. This summons was not served on the other guardian, but he heard of it, and by the direction of the Vice-Chancellor of the County Palatine took out a summons for directions in the Palatine Court. On the summons being attended, the Vice-Chancellor expressed strong disapprobation of the conduct of the mother in taking out the summons in the High Court, took an undertaking, which she voluntarily offered, not to proceed further with the summons in the High Court, and made a reference to the Registrar as to revising the allow-2] ances for maintenance. Soon afterwards, \*the mother, as next friend of the infants, applied to the Vice-Chancellor of the County Palatine to discharge the undertaking and to stay proceedings in the Palatine Court. This application having been refused, the mother, as next friend of the infants, appealed:

Held, that, although the High Court had full jurisdiction to appoint guardians and order maintenance, notwithstanding the previous orders made by the Palatine Court, such jurisdiction ought not to be exercised unless some special ground was shown, inasmuch as it was better for the infants that their maintenance and educacation should remain under the direction of the judge who had directed them for three years, and was fully acquainted with the case; and that the proceedings in the

Palatine Court ought not to be stayed:

But held, that, as the Vice-Chancellor of the County Palatine had no jurisdiction to grant an injunction to restrain proceedings in the High Court, he ought not to have taken an undertaking to discontinue them, and the undertaking was accordingly discharged.

RICHARD ALISON died in August, 1874, leaving a will by which he gave his residuary estate, amounting in value to considerably more than £400,000, upon trust as to one moiety for his great-grandson Richard A. Johnson for life, and then for his children, and as to the other moiety, upon trust for his great-granddaughter Mary E. Johnson for life, and then for her children. These great-grandchildren were the children of a deceased grandson, and were born respectively in 1863 and 1865. Their mother, Lucy Johnson, was living. Mounsey, Doke, and Houghton, were the trustees of the will.

Soon after the testator's death a petition was presented in the Court of the County Palatine of Lancaster, by the infants, their mother, and the trustees of the will, for a guardian and maintenance, upon which the usual reference was made. The Registrar made his report on the 16th of February, 1875, approving of the mother and Mr. Houghton, one of the trustees, as guardians, and allowing £4,500 a year for maintenance. The Vice-Chancellor on the 29th of June, 1875, made an order which in the main confirmed the report, but as regards maintenance allowed only £1,500 a year for the maintenance of each of the infants as from the 16th of February, 1875, and gave liberty to apply again after twelve months. In December, 1876, the matter came before the Vice-Chancellor again, and the mother proposed an allowance of £5,000 a year for the two children. The Vice-Chancellor allowed £2,000 a year for each from the 10th of August then last, and Mr. Houghton being \*dead, the order [3] gave directions for filling up the vacancy in the trusteeship and reconstituting the guardianship. On the 12th of March, 1877, the guardianship was reconstituted by the appointment of the mother and the Rev. J. B. Cox as guardians. The direction as to maintenance was continued, and a direction which had been given by the former order to the surviving trustees to take steps to fill up the vacancy in the trusteeship was also continued.

On the 9th of August, 1877, without any application to the Court of the County Palatine, an action, Johnson v. Mounsey [1877 A. 145] was commenced in the Chancery Division of the High Court of Justice, in the name of the infants, by Mrs. Johnson as their next friend, for the administration of Mr. Alison's estate, and on the 27th of September the common decree was made, the plaintiffs and defendants appearing by the same solicitors. Shortly after this, a new solicitor was appointed for Mrs. Johnson, as next friend, the trustees continuing to appear by the same solicitors as

before.

A summons in the suit was then taken out in the name of the infants, by Mrs. Johnson as their next friend, returnable on the 8th of December, 1877, asking that £4,500, free of income tax, might be allowed for the education and maintenance of the infants as from the 6th of November, 1877; and that some proper person or persons might be appointed guardian or guardians of the persons and estates of the infant plaintiffs. This summons it was proposed to serve on the defendants alone, but by the direction of the Chief Clerk it was amended and served also upon Mr. Cox. Before it had been served upon him he became aware of the institution of the suit, and of the summons having been taken out, and applied to Vice-Chancellor Little for directions. His honor directed a summons to be taken out by Mr. Cox, and to be

served on the infants and on Mrs. Johnson, for directions in the matter. Upon the summons being attended on the 8th of December, his honor expressed his opinion that the taking out the summons in the High Court was a very improper proceeding; and Mrs. Johnson, by her counsel, undertaking to proceed no further with that summons, a reference was made to the Registrar whether it was desirable that any alterations should be made in the allowances and the scheme for the education of the infants.

4] \*On the 22d of December, 1877, the infants, by Mrs. Johnson, their next friend, moved before Vice-Chancellor Little that the summons heard on the 8th of December might be reheard, and that the undertaking then given by Mrs. Johnson might be cancelled, and that all further proceedings in the matter, except for taxation of costs, might be stayed; that the costs might be taxed, and that the parties might be at liberty to apply for their payment when taxed in the action of Johnson v. Mounsey. Vice-Chancellor

Little refused the application.

The infants, by their mother as next friend, then gave notice of appeal, asking that the order of the 8th of December, 1877, might be discharged; that Mrs. Johnson's undertaking might be cancelled; that the several orders made by Vice-Chancellor Little in the matter might be discharged or suspended; and for the same directions as to stay of proceedings and payment of costs as were asked for before Vice-Chancellor Little.

Horton Smith, Q.C., and Oswald, for the appellant: The High Court is properly seised of the case, and the action there must be proceeded with: Wynne v. Hughes ('). The proceedings in the Palatine Court are insufficient for the protection of the infants, for if they were taken out of its jurisdiction they could do nothing. Then there is real estate

out of its jurisdiction to be administered.

[JESSEL, M.R.: Why can it not be administered in the Palatine Court? The court acts in personam, and West Indian estates have often been sold by the Court of Chancery. I have no doubt of the jurisdiction of the High Court to appoint guardians, though guardians have been appointed by the Palatine Court; the question is whether it is proper for it to do so.]

The High Court will give complete protection to its wards, and will not allow proceedings to be going on in another court at the same time: Johnstone v. Beattie (\*); Stuart v. Marquis of Bute (\*). The father's wishes are attended to in

<sup>(1) 26</sup> Beav., 377, 382.

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the appointment of guardians, Woolf v. Pemberton ('); and when there is no father the wishes of the mother will be attended to.

\*[JESSEL, M.R.: I am not aware of any case in which [5

that proposition has been laid down.]

There ought not to be double proceedings: Wedderburn v. Wedderburn (\*). The High Court has the custody of the property, and if the Palatine Court has to make orders for maintenance, applications to the High Court will be necessary to give effect to them.

[JESSEL, M.R.: Applications by unopposed summons,

which may cost about 30s.]

Robinson, Q.C., and Neville, contra, were called upon only on the question whether the undertaking by Mrs. John-

son ought to be treated as effectual.

JESSEL, M.R.: This is an application to discharge an order of the Vice Chancellor of the County Palatine, Vice-Chancellor Little, and also to stay further proceedings before him. The matter is one of some importance as regards the jurisdiction of the Vice-Chancellor of the County Palatine, though it is of very little importance to the infants, their property being so large that a trifling amount of extra costs must be utterly immaterial to them.

The position of matters is this: The infants are entitled for life to a very large income under the will of their greatgrandfather. They have no father, but they have a mother. They reside in the County Palatine, where, as I understand, their father resided. At all events, their great-grandfather resided there, and the bulk of the property is there. the 16th of February, 1875, a report was made in the Court of the County Palatine, under a petition presented shortly before that time, as to the maintenance and education of the That report was brought before Vice-Chancellor Little, and he settled the allowance for the maintenance of the infants, and approved of a scheme. In the month of December, 1876, that first allowance having been granted for twelve months only, the matter again came before Vice-Chancellor Little, when he altered the allowance, and he added a direction for the reconstitution of the guardianship. The next \*step was taken on the 12th of March, 1877, 6 when the guardianship was reconstituted by an order of the Vice-Chancellor, and the mother, Mrs. Johnson, and the Rev. James Bell Cox, were appointed co-guardians, and they are the present guardians; and there was a further In September, 1877, a suit was scheme for maintenance.

<sup>(1) 6</sup> Ch. D., 19; 22 Eng. R., 618. 25 Eng. Rep. 1

instituted in the High Court before the Vice-Chancellor Malins for the administration of the estate of the greatgrandfather, and a judgment for administration was obtained. Then an application was made by summons, dated the 30th of November, 1877, before the Vice-Chancellor Malins, which is in substance an application for the appointment of guardians, and for a scheme for an allowance for maintenance, and as to the school to which the boy is to be Then the matter was brought before the Vice-Chancellor Little, and it appears he took an undertaking from the mother not to prosecute that summons, which she had taken out as the next friend of the infants; and he refused an application which was made in the name of the infants on behalf of the mother to stay the proceedings in his court. The refusal to stay proceedings in the Palatine Court, and the continuance of the proceedings there, form the subjectmatter of this appeal. The summons, of course, has not yet been heard by the Vice-Chancellor Malins. There are, therefore, at the present moment, no other guardians than the guardians appointed by the Vice-Chancellor Little, and no other scheme for the maintenance of the infants than the scheme approved by him.

Now, the appellants say that we ought to stay the proceedings before the Vice-Chancellor Little, and that it is for the benefit of the infants that such stay should be made. am quite unable to accede to that view. In the first place, it is said that by reason of the pending suit before the Vice-Chancellor Malins he has full jurisdiction to appoint guardians and to make a scheme for maintenance, and that it would be exceedingly improper that there should be two schemes for maintenance ordered by two different courts, and probably irreconcilable in their terms. With all that I entirely agree. But the proceeding which we are asked to stop is not the second but the first proceeding. The Vice-Chancellor Little has had the maintenance and education of these infants before him from the commencement of the year 1875; he has \*interfered personally, and has, on one occasion, at least, overruled the decision of the Regis-He therefore, in my opinion, is a far more competent judge to decide what is proper to be done for the future than a judge who hears of the infants for the first time in the year 1878. If, therefore, I were to choose to which tribunal this matter should be remitted for decision, having regard merely to the benefit of the infants, other things being equal, I should certainly select that of the judge who is already well acquainted with the matter. But, then, it is

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said that it is the duty of the Vice-Chancellor Malins, having the infants as his wards by reason of the judgment in the administration action, to see that guardians are appointed. It would be his duty to do so if there were no guardians competent to act; and I can imagine a state of circumstances arising in which it might be the duty of the judge of the High Court to interfere even in a case which had been previously attached to the Palatine Court. that case is not raised, and there is no difficulty whatever in the guardians appointed by the Palatine Court continuing to act, or in the Vice-Chancellor of the Palatine Court settling what allowance should be made for the maintenance of the infants, or what scheme should be adopted as to their education. It has been suggested that if the funds were brought into court, application to the Vice-Chancellor Malins for payment of the sum so awarded or allotted by the Vice-Chancellor Little would be necessary. That may be so, but such an application is a mere form, it being merely a ministerial act to order payment of an allowance which has been fixed by a court of competent jurisdiction, the expense would only be a few shillings, and it might happen that the application would not be made more than once in two or three years. In the case of an estate of this magnitude, or, indeed, I may say, in the case of any other estate, the expense of such an application is not to be regarded compared with the advantage of continuing the jurisdiction of the judge who has made himself acquainted with the facts and circumstances affecting the maintenance and education of the infants. That being so, I have no hesitation in saying that two proceedings for the appointment of guardians and for a scheme of maintenance ought not to go on, but that the proceeding which is to be preferred is that which was first in order of date. Therefore it \*appears to me [8] that if the summons had been allowed to go on before the Vice-Chancellor Malins, the only result would have been that he would have declined to interfere in accordance with what I may call the universal practice among the different branches of the old Court of Chancery, and which still obtains as between the judges of the Chancery Division of the High Court, not to interfere with each other's orders as regards maintenance and education of infants.

What I have said disposes of the substance of this appeal, the object of which was, in fact, to place the Vice-Chancellor Malins in a position to review or alter what had been done by the Vice-Chancellor Little. But there is a subordinate part of it in which, I think, the Vice-Chancellor Lit-

tle made a mistake. He took an undertaking from the lady not to proceed with the summons. Now I adopt that portion of his judgment which says that if he could not have made the order, probably he ought not to have taken the The way he puts that himself is this: "But if the view I took of the matter was right, as I still think it was, then the undertaking was right in itself, and it was given after communications between the lady, her solicitor, and her counsel, of which the court knew nothing, and I think I ought not to discharge it. But I hope it will be conveyed to the Court of Appeal if the case goes there, that I would not have taken that undertaking from Mrs. Johnson if I had not thought that it was strictly in accordance with the true view of the case upon the question of jurisdiction and of her duty as one of two guardians appointed by this court, and more than that, I would not leave her under that undertaking if I thought otherwise now. Therefore the lady will go to the Court of Appeal with that expression of my opinion, and she is free to ask that court to consider what was the order proper to have been made by me at Liverpool, even in the absence of that undertaking." we treat this matter as an application to the Vice-Chancellor Little for an order to restrain the lady from proceeding with the summons.

Now I think that the Vice-Chancellor, for whom I have the greatest respect, did not sufficiently consider that he was, in fact, asked for an injunction to restrain an action in the High Court, and if this had been brought pointedly to 9] his attention, I am quite \*sure he never would have thought of doing anything equivalent to granting such an He certainly has no jurisdiction, so far as I am injunction. aware, to restrain actions in the High Court. I think he might have relied on the good sense of the judge of the High Court before whom the application in the action was brought to deal with it rightly; but it is not for the judge of an inferior court to restrain proceedings in the High Court, and it could make no difference that the taking such a proceeding in the High Court was not a proper act. the Vice-Chancellor Little considered that the guardian had misconducted herself, he might have jurisdiction to remove her, but he could have, in my opinion, no jurisdiction whatever to grant an injunction to restrain the action; and that being so, as he puts it himself, he ought not to have taken the undertaking. The undertaking, therefore, will be discharged; but, the substance of the appeal having gone

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against the appellant, I think the costs should follow the event.

It will be quite understood, from what I have said, that our discharging the undertaking is not to be considered as giving any encouragement to Mrs. Johnson to proceed with the summons.

BAGGALLAY, L.J.: In this case Mrs. Johnson, the mother of the infants, three years ago applied, or joined in applying, to a court of competent jurisdiction, for the appointment of guardians of her children and for a scheme for maintenance. Orders were made and from time to time varied, and so matters continued, the infants having guardians and being maintained down to the month of August. 1877, pursuant to the orders so from time to time made. In August, 1877, Mrs. Johnson, as next friend of her children, instituted a suit in the Chancery Division of the High Court of Justice for the administration of the estate of the I have listened attentively to the arguments of counsel in this case for Mrs. Johnson, to ascertain, if I could, what were the reasons which led to the institution of that I am bound to say that I have been unable to derive from their arguments any reason of necessity or any reason of convenience. From the nature of the arguments addressed to us, and from the fact that the decree in the suit was followed very shortly by an application for the appointment of guardians of the \*infants upon the footing of [10] there being no existing guardians, and from the fact that that summons was not served on Mr. Cox, one of the guardians appointed by the Vice-Chancellor of the duchy, I cannot resist drawing the inference that the real cause of the institution of that action was that Mrs. Johnson was not satisfied with the scheme for gardianship, and the scheme for maintenance and education which had been adopted by the Vice-Chancellor of the duchy, and that she thought it possible to obtain, in the course of this action in the High Court of Justice, other orders more in accordance with her wishes.

In that state of the case she comes here and says: "In the interest of these children I call on the court not to allow these double proceedings to go on, but to let me have my way and put an end to all the proceedings in the Palatine Court, that I may obtain in the High Court results more in accordance with my wishes." That is practically what it comes to.

Now, it appears to me impossible to say that what the appellant asks is for the benefit of her children. The order

asked for by the notice of appeal is to discharge all orders which have heretofore been made by the Palatine Court as regards the guardianship and maintenance of the children. Now, were that order to be made, there would no longer be any existing order as to guardianship or maintenance, the summons which has been taken out in the High Court might be opposed, and probably would be opposed, and, having regard to all the circumstances of the case, weeks or months might elapse before a definite decision was arrived at, and during the whole of that time the children would be left without any existing order for guardianship or maintenance.

I am far from saying that in the course of proceedings in the administration suit circumstances may not arise which may render it desirable that there should be a stay of further proceedings in the Palatine Court, but at present I can see nothing of the sort, and therefore it appears to me that this appeal should be dismissed, and dismissed with costs.

As regards the undertaking, I concur substantially in what has been said by the Master of the Rolls; but it appears from the judgment of Vice-Chancellor Little that this was an undertaking voluntarily offered, and not in any way 11] suggested from the \*bench as an undertaking to be given; there was an apology offered to the court for the course which had been pursued in taking out the summons in the High Court, and a voluntary offer to stay all further proceedings on that summons, and although I do not think that the undertaking was one which could be enforced against Mrs. Johnson, I cannot help feeling a little surprised that after what took place on that occasion this application should be made.

THESIGER, L.J.: I am entirely of the same opinion, and for the reasons given by the other members of the court.

Solicitors: Crook & Smith; Chester & Co.

See 23 Eng. Rep., 849 note; 16 Am. Dec., 661 note.

A testator bequeathed \$4,000 to his grandson, payable on his attaining twenty-one, and in case of his death before that period the amount was to revert to the residuary estate, and it had been decided (ante, vol. 25, p. 253) that in the events that had happened, the grandson was absolutely entitled to one-half of the residuary estate, the income of which was amply sufficient for his maintenance:

Held, that although the testator had been in loco parentis to the infant, the

infant was not entitled to claim interest on the legacy for his maintenance; but that being entitled to one-half of the residue as next of kin, and there being a quasi intestacy as to the interest on the legacy, one-half of it should be paid into court to the credit of the infant; the legacy itself to be paid into court upon the trusts of the will: Rees v. Fraser, 26 Grant's Chan. Rep., 233.

A clause in a will directing the executor appointed by it "to disregard the statute of limitations as to the principal, but not as to the interest upon indebtedness" of the estate, authorizes

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the principal of just debts, authenticated as required by the will, to be allowed and paid by the executor, although barred by limitation.

To authorize the annulling of an approval of claim under the discretion vested by such will, would require a clear and palpable violation of such discretion on the part of the executor in allowing a debt under the will: Campbell v. Shotwell, 51 Texas, 27.

Where a trustee is authorized and directed to apply the income of property for the use and benefit of J. C. and his children, in such a way or manner as to the trustee may seem right and proper, the trustee has no right to exclude any of the cestuis que trust from the benefit; the discretion vested in the trustee being as to the amount and mode of application—not as to the persons to be benefited. This discretion, within these limits, the court will not control: Coy v. Coy, 25 Grant's (U.C.) Chy., 267. See also Bain v. Mearns, 25 Grant's

(U.C.) Chy., 450.

[8 Chancery Division, 11.] C.A., Feb. 7, 14, 1878.

## Ex parte HAYMAN. In re Pulsford.

Administration in Bankruptcy—Joint and Separate Estate—Ostensible Partner—Holding out—Partners—Reputed Ownership—Leave to appeal to House of Lords—Question of Fact.

On the dissolution of a partnership between H., C., and P., notice was given to the creditors that the business would thenceforth be carried on by P. alone, under the firm of P., Son & Co. After this the business was carried on under that firm, and a banking account was opened in that name. P.'s son constantly signed checks upon that account in the name of the firm. He also accepted bills in the name of the firm, negotiated loans to the firm, and sometimes ordered goods in the name of the firm. The name P. alone appeared on the outside of the business premises. The business was continued for a year and a half, and then P. and his son were, on the petition of a creditor of the business, jointly adjudicated bankrupts, as having traded as partners. They did not resist the adjudication. H., with whom, on the dissolution of the old partnership, P. had covenanted for the payment of £6,105, part of the capital of H. in that partnership, applied to the court to annul the adjudication. The Registrar refused the application, on the ground that, though no actual partnership had existed between the father and son, the son had been held out to the petitioning creditor as a partner, so as to entitle him to maintain the adjudication.

This decision was not appealed from. H. then applied to the court for a declaration that the assets of the business were separate estate of the father. Both father and son deposed that no actual partnership had subsisted between them, but that it was intended from the first that the son should be a partner if the business had turned \*out profitable. The petitioning creditor deposed that the son had been held [12] out to him as a partner. Evidence tending in the same direction was given on behalf of another creditor. Eight other creditors (the whole number who had proved being eighty-two) deposed that they had always treated the son as being a partner, and constituting with the father the firm of P., Son & Co.:

Held, that the assets must be treated as joint estate of father and son.

The rule that the doctrine of reputed ownership does not apply as between a dormant and an ostensible partner, does not include a case where the real owner of property allows it to be employed in a business in which another person is a partner with himself. In such a case the property will, in the event of bankruptcy, be, by virtue of the doctrine of reputed ownership, treated as joint estate of the two: Per James, L.J.

Reynolds v. Bowley (1) distinguished.

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Ex parts Arbouin (1), In re Rowland & Crankshaw (2), and Ex parts Sheen (3), explained.

Leave to appeal to the House of Lords refused, on the ground that the question in dispute was merely one of fact.

(1) De G., 359. (2) Law Rep., 1 Ch., 421. (3) 6 Ch. D., 235; 22 Eng. R., 781.

[8 Chancery Division, 26.]

V.C.B., Nov. 22, 1877. C.A., Jan. 12, 14; Feb. 15, 1878.

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[1877 L. 181.]

Partnership—Agreement to refer Disputes to Foreign Tribunal—Dissolution—Stay of Proceedings—Receiver—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), sec. 11.

The plaintiff and three other persons, G., N., and F., all British subjects, entered into an agreement, in the Russian language and registered in Russia, to trade in copartnership in Russia, providing (inter alia) that the head office of the firm should be in St. Petersburg: and reserving to G. and N. the right to recall their capital within a year, and, if not paid within a month, the firm was to be wound up; and also providing that "all disputes, no matter how or where they shall arise, shall be referred to the St. Petersburg Commercial Court," whose decision shall be final. The plaintiff alleged that there was a contemporaneous English agreement, not registered in Russia, by which G. and N. agreed to compensate the plaintiff in the event of a dissolution within a year, under the powers reserved to them. The two partners exercised their right within the year to recall their capital, and immediately took steps to wind up the partnership in Russia. The plaintiff having thereupon 277 commenced an action in England, alleging that the \*proceedings of his copartners, the defendants, were taken without his knowledge and sanction, and were invalid and not binding on him, and claiming a dissolution of the partnership, relief in respect of the English agreement, the appointment of a receiver and other relief, the defendants moved for a stay of proceedings in the action and a reference to the St. Petersburg Commercial Court:

Held, that an agreement to refer all disputes to a foreign court is within the 11th section of the Common Law Procedure Act, 1854, and that the defendants were entitled to an order on their motion; and that, although the court had jurisdiction to appoint a receiver pending a reference to arbitration, it was not proper to do so unless a special case was made, as the course of liquidation before the tribunal chosen by the parties themselves would thereby be interfered with.

Semble, if a sufficient case were shown for granting an injunction, the court would

not stay proceedings.

Motion. In July, 1876, arrangements were made between the plaintiff and the defendants Garrett, New, and Froom (all British subjects, the first two of whom were resident in England), for re-establishing and carrying on in copartnership in Russia the business of H. B. Froom & Co., then recently in liquidation in St. Petersburg, and which had been transferred to the defendants Garrett and New by the liquidator. A partnership deed dated the 3d of August, 1876, was executed, which was in the Russian language and was executed and registered in Russia, and which provided

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(amongst other things) that the chief offices of the firm should be at St. Petersburg; that the capital of the company should be 300,000 silver roubles, of which sum there should belong to Froom and Law 25,000 roubles each, and to Garrett and New 125,000 roubles each; and that the books of the firm both in England and Russia should be balanced on the 31st of March in each year. By the 11th article it was provided that during the first year Garrett and New should be entitled to demand back their capital, and that if their demand was not satisfied within one month's time, then without delay the firm should proceed to liquidation; article 17 provided that "in case of any disputes arising between the parties to this agreement, or their executors, such disputes, no matter how or where they may arise, shall be referred to the St. Petersburg Commercial Court, or to any court which may have taken its place—the decision of such court shall be final."

\*Differences having arisen, Garrett and New, on the [28 21st of June, 1877, served Law and Froom with a written notice demanding the repayment of their capital. The notice was accepted, but the money was not paid. Thereupon Garrett and New, in conjunction with Froom, executed certain protocols, being (as they alleged) the only necessary steps according to Russian law for winding up their partnership in St. Petersburg, and thereby appointed Froom receiver and liquidator in the winding up, directing him to remit any surplus assets to England to nominees of Garrett and New. It did not appear that the Russian tribunal had taken any action in the matter, or that any application had been made to it.

On the 11th of August, Law commenced an action in England against his copartners, alleging that the partnership arrangement was contained not in one but in three documents, all executed in England, but one of which, in order to conform to Russian law, was translated into Russian and executed and registered in Russia. He further alleged that by one of the English documents it was provided that if Garrett and New exercised their power of dissolving the partnership within the first year, he was to have the Moscow branch of the business made over to him, together with goods from that branch of the estimated value of £3,000; that the proceedings for winding up instituted by the defendants were taken without his knowledge and consent, and were not in accordance with Russian law and not binding on him, and he claimed a dissolution of the partnership, a declara-

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tion that he was entitled to the £3,000 and other rights, for the appointment of a receiver, and other relief.

The plaintiff then moved for the appointment of a receiver, and was met by a cross motion by the defendants for a stay of proceedings and a reference of all matters in dispute to the St. Petersburg Commercial Court. Both motions came on together before Vice-Chancellor Bacon. It was deposed to by the defendants that the assets were in Russia, although there were English creditors.

The motion was heard before Vice-Chancellor Bacon on

the 22d of November, 1877.

\*Sir H. Jackson, Q.C., and J. Armstrong, for the defendants: The mere non-existence of the usual technical words of an arbitration clause is no objection to our motion. The word "arbitration" in section 11 of the Common Law Procedure Act is not to be taken in its strict legal sense, but means any domestic legal forum that the parties shall agree In In re Durham County Permanent Benefit Building Society (1), the matter in dispute was agreed to be referred to your Lordship as the judge in the matter of the winding-up. We contend, therefore, that in each case the intention of the parties is to be considered, and that whenever there is a contract that "all disputes shall be referred," that, within the spirit and meaning of the act, is "an agreement to refer to arbitration," and entitles the parties to it to oust the jurisdiction of this court, and to go before the special tribunal they have selected: Willesford v. Watson (\*); Plews v. Baker ('); Gillett v. Thornton ('). In this case, for all purposes of jurisdiction, the place of arbitration is the Commercial Court at St. Petersburg.

As to a receiver, his appointment would cause a conflict between English and Russian law; and, even if this court has jurisdiction to appoint a receiver pending this reference, no wasting of assets is alleged, and no case suggested which

necessitates his appointment.

Hemming, Q.C., and Crossley, for the plaintiff, and in

support of the motion for a receiver:

[Bacon, V.C.: The pressing matter before the court is

whether a receiver should be appointed.]

As to a receiver: we say that the assets are not safe, and that the court will not, after a dissolution, allow three partners to oust the fourth partner from all participation in the winding-up of the partnership, and to place the assets in the hands of a party whom they select without the knowledge

<sup>(1)</sup> Law Rep., 7 Ch., 45. (2) Law Rep., 8 Ch., 473.

<sup>(8)</sup> Law Rep., 16 Eq., 564. (4) Law Rep., 19 Eq., 599; 18 Eng. R., 580.

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and consent of the fourth partner, but will place them in safety until the question in dispute between the partners has been settled; especially when, under a \*certain [30 document, which the defendants treat as a nullity, we claim

a large share of the assets.

As to the defendants' motion: we claim to have this partnership wound up on the footing of three documents. The defendants rely on one document, and the arbitration clause which it contains. But we say that that clause refers only to disputes arising between the partners in carrying on the business, and cannot be extended to circumstances arising after an agreed dissolution has taken place, nor can it apply to disputes arising on other documents which the defendants themselves assert do not form part of the partnership arrangement. But if it does apply, the court, in the exercise of its discretion under the 11th section of the act, will not stay proceedings in a case where, as here, the material question is whether a receiver should be appointed; and if it does stay proceedings, it will at any rate appoint a receiver to protect the assets pending the reference to arbitration.

BACON, V.C.: In this case there are two matters to be considered. The first is whether the proceedings instituted by the plaintiff in August, 1877, should be stayed or not. Now, the ground suggested for that is that the plaintiff being a partner with the defendants, the partnership was constituted, as the plaintiff says, by three agreements, but, according to the defendants, in one document, and that one providing, "in case of any disputes arising between the parties to the agreement, or their executors, such disputes, no matter how or where they may arise, shall be referred to the St. Petersburg Commercial Court, or to any court which may have taken its place, and the decision of such court shall be final." That there are disputes between these parties is unquestionable, which is all that has to be ascertained, and, if it be so, they by their contract, the contract which is confirmed by the principle and operation of the Common Law Procedure Act and by the cases which have been referred to, have entered into a binding agreement that, whatever may be their disputes, "how or where they may arise" -I do not say it does or does not mean whether in Russia or England, but the words are wide enough to comprehend that—they may or may not—they shall be referred to that \*Now the further facts to be considered are, [31 that, under the terms of the partnership deed there being a power in the defendants to put an end to the partnership, the statement of claim sets out a notice by which the de-

fendants New and Garrett, having determined to dissolve the partnership, determined it on the 21st of June, 1877, and "the plaintiff accepts such notice as a dissolution of the partnership, and claims all such rights and sums of money as he may be entitled to on that footing." It goes on further to make statements, none of which show any waste or improper application of the partnership assets. It alleges that the partnership "is now without funds, and it has exhausted all its means of credit at the bankers and otherwise:" and upon those allegations the plaintiff comes and asks this court for a declaration of dissolution. First, he says a notice was given by his late partners, which he accepts, and then he asks for a declaration that the terms of the partnership have not been altered or varied by the defendants' notice of dissolution or otherwise. That means there is a dispute between the parties, which by their contract they have agreed shall be referred to the tribunal at St. Peters-It asks, further, a declaration that the partnership was dissolved within the meaning of the 11th clause of the document dated the 3d of August, 1876, that is, the Russian document; for a declaration that in the events which have happened the defendants Garrett and New have become jointly and severally liable to pay the plaintiff the sum of £3,000. That is agreed to be referred to St. Petersburg. Then, "for an order on the defendants to indemnify the plaintiff from all liability for or on account of bills drawn or accepted by the defendants or any one of them for other than partnership purposes, or in contravention of any of the articles of partnership." That plainly comes within the agreement to refer to the St. Petersburg tribunal. Then, "for the taking of preliminary accounts." That is open to the same observation. The next is "for the appointment of a receiver and manager of the partnership business with a view to the winding-up and sale thereof." Now, that leads me to the second question about a receiver. At the time the statement of claim was filed the proceedings in Russia were on foot. There had been a liquidation, and a receiver or liquidator was appointed; and yet there is not one word 32] in the statement of claim upon that \*subject. It is The clause providing for the passed over as non-existing. reference to the St. Petersburg Commercial Court is also omitted. That cannot have been accidentally omitted. plaintiff also states that the two defendants had appointed the defendant Froom liquidator without his concurrence. If three partners out of four, a dissolution having taken place, agree to appoint a liquidator, I am not at all prepared

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The plaintiff was never to say that is not perfectly right. consulted, he says, about the winding-up of the partnership business, but he accepted the notice of dissolution. never had any notice that Mr. Froom was to be appointed liquidator, and he asserts that the acts of the defendants in and about the winding-up, and so on, are null and void as against him. I cannot accept any such vague allegation as I say again, one of the questions between the parties was whether the reference should go to the tribunal of commerce in St. Petersburg or not, and knowing he was bound by the agreement to submit to that reference, he suppresses it, or at least omits it, from the statement of his claim. There then only remains to be considered, whether, upon the facts stated, a receiver should be appointed. I am very far from saying that it is of necessity that a receiver should not be appointed when there has been an agreement to refer to arbitration. On the contrary, in the case of Plews v. Baker (1) the receiver was appointed. For what reason? There were debts to be received accruing up to the time when the dissolution took place. Either partner would have a right to receive those debts; and for the common convenience of all the partners, and in justice to all of them, it was thought convenient that there should be one hand to receive those debts, and the plaintiff was appointed by consent—the consent only goes to the person of the plaintiff—to receive them. For every convenience it was necessary that it should be so, and that was the reason for it. I have heard no shadow of reason why a receiver should be appointed here. cern is apparently insolvent. The terms of the partnership are distinctly stated, and one of those terms gives the defendants a right to dissolve. It is said there is no money, that the means of carrying on the business are exhausted; but the dissolution has taken place. The plaintiff is content with the dissolution, \*and yet he asks me to appoint [33] a receiver upon such facts as are here stated. I can conceive no ground whatever why a receiver should be appointed, or why, even if it were only upon the ground of expense, there should be any interference by this court. To stay these proceedings will do no harm, because there is, as I have said, a contract that their disputes, whatever they may be, should be referred to the tribunal in St. Petersburg. What may be the result of that reference to the tribunal in St. Petersburg, is not for me now to say. If the decision of the tribunal in St. Petersburg does not comprehend all that the plaintiff thinks he has a right to assert against the de-

fendants, he may—I do not know whether he will or not have an opportunity of resuming the proceedings here. For the present, until the partnership accounts are taken, for which the liquidator has been appointed, in whom all the rights that the partners had, I must assume, are vested, there is no reason why that proceeding should be interfered with; and it would be contrary to the principle of law now established, that that agreement to refer to a special tribunal should be interfered with by this court, and that the jurisdiction of this court should extend beyond the subject to which the parties to the contract agreed it should be con-I am of opinion it is right that the proceedings should be staved. I am also of opinion that no ground is alleged upon which it is requisite or would be just that a receiver should be appointed. There will therefore be an order on the defendants' motion to stay proceedings in the terms of Willesford v. Watson ('), and the costs will be reserved.

The plaintiff appealed from both orders. The appeal came

on for hearing on the 11th of January, 1878.

Hemming, Q.C., and Crossley, for the appellant: court will appoint a receiver for the protection of the assets, at all events a receiver of the assets directed to be sent to England, which the Russian court has no power to protect, even if it has power to appoint a receiver at all, which does not appear. A partner in a dissolved partnership has a right to a receiver without showing special grounds: Thom-34] son v. \*Anderson (\*); Lindley on Partnership (\*). appointment of a receiver is within the discretion of the court, and looking at the conduct of the parties, the protection afforded by a receiver is requisite. Then as to the stay of proceedings, justice cannot be done in Russia, for the Russian court will only take cognizance of the Russian deed, and the main object of the English action is to enforce the agreement for compensation. The jurisdiction of the court is not ousted by the agreement to refer, Cooke v. Cooke ('); and it will not stay proceedings where there is a right to a receiver: Willesford v. Watson ('). The case is distinguishable from Plews v. Baker ('). A general winding up is not within the scope of the agreement to refer. The taking the accounts of a partnership is not a "dispute."

Then on the other motion, the court has no jurisdiction to stay proceedings except under the Common Law Procedure Act, 1854, and that plainly applies to arbitrations in the

<sup>(1)</sup> Law Rep., 8 Ch., 473. (2) Law Rep., 9 Eq., 523, 538. (3) 3d ed., p. 1066.

<sup>(4)</sup> Law Rep., 4 Eq., 77. (5) Law Rep., 14 Eq., 572, 578.

<sup>(6)</sup> Law Rep., 16 Eq., 564.

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ordinary sense which are subject to the control of the court,

and not to agreements to refer to foreign courts.

Even if there were jurisdiction in such a case, the agreement to refer here is limited to the matters comprised in the Russian deed, and not to any extraneous disputes such as that in respect of the compensation to the plaintiff.

Sir H. Jackson, Q.C., and J. Armstrong, for the defendants, were desired to confine themselves to the question as to staying proceedings: We say that the case is within the

Common Law Procedure Act, 1854.

[James, L.J.: Have we jurisdiction to stay proceedings? Does the statute apply where the reference cannot be made

a rule of court ?]

We say that the 11th section of the act includes the case. It is true that we have not in the agreement here the word "arbitration," but arbitration is only a reference to a domestic forum chosen by the parties, and we therefore have the substance: Gillett v. Thornton (1).

\*[JAMES, L.J.: Does not arbitration in the act [35 mean an arbitration in which the reference can be made a rule of court, and over which the court can exercise control?]

Section 11 is expressed in very wide terms, which are not cut down by any words of reference. The scope of the act was to discourage litigation and keep the parties before the tribunal which they have chosen. The object of the agreement here was to keep the partnership out of court, and the taking the accounts of the partnership is within its scope. An analogy in favor of this view is furnished by In re Durham County Permanent Benefit Building Society (\*).

[JAMES, L.J.: In that case there was an award.]

Hemming, in reply.

JAMES, L.J.: In the exercise of our discretion we do not think that it would be right to appoint a receiver of the assets of a Russian partnership which is being wound up in Russia, unless some special case of danger to the assets is shown. We should not expect a Russian court to appoint a receiver of the assets of an English partnership which is being wound up in an English court, and we must assume that the Russian court will do what is right. We will take time to consider whether there is anything to prevent our giving effect to the agreement to leave all matters in dispute to the Russian tribunal.

Feb. 15. BAGGALLAY, L.J., now delivered the judgment of the Court (James, Baggallay, and Thesiger, L.JJ.):

<sup>(1)</sup> Law Rep., 19 Eq., 599; 13 Eng. R., 530.

<sup>(2)</sup> Law Rep., 7 Ch., 45.

In this case the plaintiff appeals from two orders made by Vice-Chancellor Bacon on the 22d of November last in an action for winding up the affairs of a partnership between the plaintiff and the defendants. By one of such orders the Vice-Chancellor refused an application of the plaintiff for the appointment of a receiver, and by the other, upon the application of the defendants, he stayed all proceedings in the action until further order, reserving liberty to any of the parties to apply.

parties to apply.

36] \*Both orders were based upon the circumstance that the articles by which the partnership was regulated contained provisions for the reference of all matters in dispute

to arbitration.

The partnership was entered into in 1876 for the purpose of carrying on the business of engineers and merchants in St. Petersburg.

The articles, which bear date the 3d of August, 1876, are in the Russian language, they were executed in Russia, and were registered in that country in accordance with the requisitions of Russian law.

Provision for the reference of disputes to arbitration was made by the 17th article, of which the following is a translation: "In case of any disputes arising between the parties to this agreement, or their executors, such disputes, no matter how or where they may arise, shall be referred to the St. Petersburg Commercial Court, or to any court which may have taken its place, the decision of such court shall be final."

Under the 11th article the defendants Garrett and New were entitled within the first year to demand payment of their capital, and if the demand was not complied with within a month the firm were to proceed to liquidation. On the 21st of June, 1877, being within a year from the commencement of the partnership, the defendants Garrett and New gave notice demanding payment of their capital, and such

payment was not made within a month.

It is the common case of the plaintiff and of the defendants that the partnership was dissolved by that notice. Steps were accordingly taken by the defendants Garrett and New in St. Petersburg to wind up the affairs of the partnership, and the defendant Froom was appointed liquidator and receiver for that purpose. The plaintiff thereupon commenced the present action, and on the 4th of October, 1877, served the defendants with notice of motion for the appointment of a receiver, and on the 11th of the same month the defendants served a counter-notice on

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the plaintiff for a stay of proceedings in the action and a reference of all matters in dispute to the St. Petersburg Commercial Court.

Now, if there had been no other material facts in the case than those just stated, the orders made by the Vice-Chancellor could hardly have been resisted; it would have been a case for the exercise of the discretion conferred upon the Vice-Chancellor by \*the 11th section of the Common Law Procedure Act of 1854, and such discretion could hardly have been exercised otherwise than in the way in which it has been exercised by him. In the course of the argument on the part of the appellant, some reliance was placed upon the case of Cooke v. Cooke ('). In that case the question was raised by plea, and all that Vice-Chancel-lor Wood decided was that the jurisdiction of the superior courts was not ousted by the provisions of the Common Law Procedure Act. That such jurisdiction was not ousted is clear from the terms of the act itself, which merely confers upon the court applied to the power to order a stay of proceedings upon being satisfied that no sufficient reason exists why the matters cannot or ought not to be referred to arbitration according to the agreement.

We entirely concur in the views expressed by Lord Selborne in the case of Willesford v. Watson (\*), to the effect that if since the passing of the Common Law Procedure Act parties choose to determine for themselves that they will have a forum of their own selection instead of resorting to the ordinary courts, a prima facie duty is cast upon the

courts to act upon such arrangement.

Now, is there anything in the present case to rebut the prima facie case arising out of the 17th article? It is true that the plaintiff prays for an injunction, and if a case for an injunction was made by the evidence, that would probably be a sufficient reason for refusing to send the matter to arbitration; but no such case is made, indeed it is somewhat difficult to make out from the pleadings or the evidence in respect of what the injunction is asked.

A claim is also made for the appointment of a receiver, but, with the exception of the circumstance to which we are about to allude, no case whatever is made which could call

for such an appointment.

By the 4th paragraph of what may be called the prayer of the claim, the plaintiff asks for a declaration that in the events which have happened the defendants Garrett and

<sup>(1)</sup> Law Rep., 4 Eq., 77. 25 Eng. Rep.

New have become jointly and severally liable to pay the sum of £3,000. This claim arises in the following way: It appears that before and down to the month of June, 1876, the plaintiff was engaged in business on \*his own account as a merchant at Moscow, and during the negotiations for the partnership, arrangements were made for the transfer of this business to the new firm, and for this purpose two memoranda of agreement were prepared. Both bear date the 10th and 22d of July, 1876; one provided for the discontinuance by Mr. Law of his business at Moscow, and for the transfer of such business to the new firm, and by the other, which purported to be made between the plaintiff and the defendants Garrett and New only, but as to the execution of which by those defendants there appears to be a question, provision was made that in the event of the partnership being liquidated or dissolved within one year, by reason of the exercise by the defendants Garrett and New of certain powers conferred or to be conferred upon them by the articles of partnership, the plaintiff should be compensated by the making over to him of the firm's business at Moscow, and of goods of the estimated value of £3,000.

Under these circumstances it has been contended on the part of the plaintiff that his right to this sum of £3,000 cannot be enforced in the Russian court, and that for his protection in respect of it a receiver ought to be appointed, if not of all the assets of the firm, at any rate of such moneys or other assets as may be brought to this country. We are by no means satisfied that his rights in respect of this sum, if he has any, as to which we express no opinion, cannot be properly adjudicated upon and enforced in the Russian court; but however this may be, we are of opinion that until it is shown that no adequate relief in respect of such rights can be obtained by him in the course of the proceedings in Russia, it would not be proper by the appointment of a receiver to impede the general liquidation of the partnership in the manner in which the partners have themselves

decided that it shall be liquidated.

Should it appear in the course of the liquidation that the plaintiff's rights and interests are not adequately protected, an immediate application can be made to the Vice-Chancellor under the reservation contained in his order, which, it is to be observed, is not an absolute order for the stay of proceedings, but one which merely stays proceedings in the action until the result of the proceedings before the St. Petersburg Commercial Court shall be known, or until further 39] order shall be made by the Vice-Chancellor; and \*any

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of the parties have liberty to apply as to continuing the action, and generally on the result of the proceedings in the St. Petersburg court.

Both appeals must be dismissed with costs.

Solicitors: Carr, Bannister & Co.; F. T. Dubois.

See 6 Eng. Rep., 800 note; 13 Eng. Rep., 663 note; 17 Eng. Rep., 237 note; 22 Eng. Rep., 431 note; 24 Eng. Rep., 651 note.

A policy of insurance, issued by the defendant, provided as follows:

"If differences of opinion should arise between the parties hereto, as to the amount of loss or damage upon property damaged, the subject shall be referred to two disinterested and competent men, each party to select one (and in case of disagreement they to select a third) who shall, under oath, ascertain, estimate and appraise such partial loss or damage upon each article separately, and their award in writing shall be binding on the parties hereto."

Held, that this clause had no application to a case in which there was no difference of opinion as to the amount of the loss or damage, but in which the defendant denied all liability under the policy: Lasher v. Northwestern, etc., 18 Hun. 98.

Where a building contract provides that the employer shall pay to the con-

tractor a certain sum in weekly payments, upon "the certificate of the architect certifying the same," the omission in the certificate to state that the building is completed according to the specifications, will not impair the validity of the certificate under the contract certifying the amount due.

Where parties to a building contract agree that a superintendent shall pass upon the work and certify as to the payments to be made, his decision is binding and conclusive, unless impeached by showing fraud or mistake, and evidence to contradict such certificate without offering to show fraud or mistake is inadmissible: Downey v. O'Donnell, 92 Ills., 559.

An agreement by which a city undertakes with the owners of land, taken for a street, to submit the assessment of damages and betterments to arbitration, is ultra vires and void; and the city cannot maintain an award made under such submission: Somerville v. Dickerman, 127 Mass., 272.

[8 Chancery Division, 89.]

FRY, J., July 10, 11, 1877. C.A., Feb. 23, 25, 1878.

NEWBY V. SHARPE.

[1876 N. 46.]

Landlord and Tenant—Quiet Enjoyment—Premises let for Purpose subsequently made illegal—Warranty of Legality—Eviction—Practice—Amendment,

The defendant let the basement of a store to the plaintiff "with full and undisturbed right and liberty to store cartridges therein," and covenanted to keep the premises in proper repair and condition, so as to be available for storing cartridges, and covenanted for quiet enjoyment. Other parts of the store were at that time let to other persons for storing gunpowder. Soon afterwards the Explosives Act, 1875, passed, making it illegal to store cartridges and gunpowder in the same building. The defendant, upon the act coming into operation, removed the plaintiff's cartridges out of the building. A correspondence ensued, and the defendant stated to the plaintiff that the basement was at the plaintiff's disposal, but that if the plaintiff stored cartridges there the defendant must, to protect himself from liability, give notice to the authorities. The plaintiff thereupon commenced his action to restrain the defendant

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from obstructing the storing of his cartridges, and to compel the defendant to do everything necessary to enable the plaintiff to store them there, and for damages: Held, by Fry, J., that the plaintiff was entitled to damages for the loss of the use of the demised premises, on the ground that the defendant's acts amounted to eviction. Held, by the Court of Appeal, that judgment must be entered for the defendant, for that, 1, there had been no eviction, the removal of the plaintiff's cartridges being only a trespass; and, 2, there had been no breach of covenant by the defendant, for that the covenant to keep the premises in proper condition for storing cartridges only referred to their physical condition; and that the grant of liberty to store cartridges there did not import a warranty of the legality of so storing them, nor did anything in the lease bind the defendant to procure licenses to make the storage legal. Semble, an amendment converting a claim on the footing of a subsisting lease into a claim on the footing of eviction ought not to be allowed.

By an indenture of lease dated the 12th of April. 1875. and made between J. C. Sharpe, the defendant and lessor, 40] of the one \*part, and E. H. Newby, the plaintiff and lessee, of the other part, the lessor demised to the lessee all the basement story of a gunpowder magazine or warehouse situate at Barking, in the county of Essex, "together with the full and undisturbed right and liberty to store cartridges therein," for the term of three years, to be computed from the 12th day of April, 1875, yielding and paying during the first year of the term the clear rent of £150, and during the second and third years of the term the rent of £200, at the times and in the manner in the said lease mentioned. And the lessor covenanted that he would during the term keep the premises thereby demised, and also the pier or landing place adjoining and belonging thereto, "in proper repair and condition, so that the same may at all times during the said term be available by the lessee, his executors, administrators, and assigns, for the storing, landing, or shipping away of cartridges;" and that the lessor would keep a proper storekeeper, who should receive and deliver out the cartridges, the lessee providing the labor. And the lessor, for himself, his heirs, and assigns, covenanted with the lessee, his executors, administrators, and assigns, that he, the said lessee, his executors, administrators, or assigns, paying the rents and observing and performing the covenants and agreements therein reserved and contained, might peaceably and quietly have, hold, occupy, and enjoy all and singular the premises thereby demised, with their appurtenances, for and during the term thereby granted, without the let, suit, or eviction of or by the said lessor, his heirs, or assigns.

The plaintiff took possession of the demised premises and stored cartridges in them. Other parts of the magazine were under lease to other persons for the storage of gunpowder. One of the leases was for twenty-one years from 1869 to the Kennall Vale Gunpowder Company; and at the

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time when this action was commenced the company had

about 40,000 lbs. of gunpowder stored there.

On the 14th of June, 1875, an act, 38 Vict. c. 17 called the Explosives Act, 1875, was passed, providing for the licensing of gunpowder magazines and factories. By secf. 9 it was enacted that the factory or magazine, or any part thereof, should not be used for any purpose not in accordance with the license; and it was enacted that in the event of any breach of this section, the \*gunpowder or ingre- [4] dients thereof in respect to which or being in any building, or machine in respect to which the offence was committed, might be forfeited, and the occupier should be liable to pen-By sect. 10 it was provided that, "(1.) In a factory every factory magazine, and in any other magazine every building in which gunpowder is kept shall be used only for the keeping of gunpowder and receptacles for or tools or implements for work connected with the keeping of such gunpowder." It was stated that the Home Office held this clause to prohibit the storage of cartridges, containing means of ignition, in the same building with gunpowder. By sect. 14 it was provided that "the occupier of any lawfully existing magazine may until the expiration of the time within which he is required to send to the Secretary of State an application for a continuing certificate (namely, before the expiration of three months after the commencement of the act) carry on his business in such magazine in like manner as if this act had not been passed." The act came into operation on the 1st of January, 1876.

On the 25th of March, 1876, the defendant wrote to the plaintiff stating that he regretted being unable to arrange to remove the gunpowder from the magazine, and that, as under the new act it was illegal to store cartridges in the same building with gunpowder after the 31st instant, he had arranged for the removal of the plaintiff's cartridges temporarily into an adjoining building. The plaintiff on the 29th wrote back, "I have your favor of the 25th instant, and learn with surprise that you have removed, or propose to remove, my cartridges from a place I have leased of you for a term at present unexpired. I must beg of you to do nothing of the kind, and as to the removal of the gunpowder, that becomes really imperative now, as in a very few days I shall have several millions of cartridges at the magazine which must be at once stored." The defendant replied on the 31st, "Since writing you on the 25th, I am informed on high authority that under the New Explosives Substances Act, cartridges having their own means of ignition cannot

be stored in a gunpowder magazine (with or without powder stored in it) under a continuing certificate. A new license must be got and a new building erected. The space now leased to you is held at your disposal, but looking at the 42] \*liability to serious penalties of all parties, and the certainty of a seizure, I should feel myself obliged at once to report the circumstances to the authorities before the cartridges are landed, to relieve myself from the onus. I regret it should be so, as I have no interest but to meet your views."

The defendant on the same 31st of March removed the plaintiff's cartridges out of the magazine into a wooden building which he had placed at the rear of the magazine. They were subsequently seized by the government, but were ultimately given up to the plaintiff and removed by him.

mately given up to the plaintiff and removed by him.

On the 13th of April, 1876, the plaintiff's solicitors gave the defendant formal notice that the plaintiff required the defendant to store about 4,000,000 of cartridges, which were daily expected in the River Thames. The defendant replied, "I am in receipt of your letter, but I scarcely see the utility of the notice it contains, as the space leased by us to Mr. Newby is always at his disposal. I am not aware that in my recent correspondence with Mr. Newby I have ever stated otherwise, but have rather pointed out the bearing of the New Explosives Substances Act upon the lease in question."

On the 24th of April, the plaintiff commenced this action. By the statement of claim the plaintiff set out the material parts of the lease, omitting the covenant for quiet enjoyment, and stated that he had paid all the instalments of rent that had become due. He then stated the notice of the 13th of April, 1876, and went on to allege that the cartridges there mentioned had arrived, and that the defendant refused to receive and store them. He then went on to state that he was obliged, as a temporary measure, to store them in government barges at a considerable expense. The plaintiff claimed an injunction to restrain the defendant from obstructing the storing of the cartridges on the demised premises, and that the defendant might be ordered to do everything necessary or proper to enable the plaintiff to deposit the cartridges there, and to render such premises fit and proper for the legal deposit therein of loaded cartridges. The claim also asked for damages.

The action came on for trial before Fry, J., on the 10th

and 11th of July, 1877.

43] \*Swanston, Q.C., and Owen, for the plaintiff: The plaintiff must be entitled to damages for his loss. The de-

fendant when he granted the lease must have known that this act was about to be passed. It is not proved that he has made any attempt to get the other lessees to remove the gunpowder, and he must take his choice which he will keep, giving compensation to whichever is damaged. There is a clear breach of covenant, and though the performance of a covenant may have become impossible, damages for non-performance have often been given: Lord Clifford v. Watts (1); Baily v. De Crespigny (2); Brown v. Royal Insurance Company ('); Hale v. Rawson (').

As to the omission to set out the covenant for quiet enjoy-

ment and the breach of it, we ask leave to amend. FRY, J., gave leave to amend.

North, Q.C., and Langley, for the defendant: There has been no let, suit, or eviction by the defendant, and the store remains as it was, except that the cartridges are liable to The defendant has no means of turning out his lessees, and the plaintiff must have known at the time that gunpowder was stored there. The defendant has, in fact, saved the plaintiff from loss. But even if the defendant has prevented the storage of cartridges, the plaintiff cannot recover damages, as the defendant has been obliged by the alteration of the law to take this course: Brewster v. Kitchell (\*); Sutton v. Temple (\*); Doe v. Rugeley ('); Mayor of Berwick v. Oswald (\*); Brown v. Mayor of London (\*). The. court would not enforce such a covenant, and therefore ought not to give damages.

FRY, J., after stating the lease, continued:

The first point to which I would advert is the question of the amendment of the pleadings. The statement of claim does not \*set out the covenant for quiet enjoyment, nor does it set out an alleged breach of that covenant on the 31st of March, 1876. But I gave leave for an amendment of the statement of claim, and for this reason, that I think the material issues are better brought before the court on such an amendment, and that it is quite clear that there is no surprise on the defendant by allowing the amendment, because the defendant has in his statement of defence set out the covenant for quiet enjoyment, and in his evidence by way of affidavit filed at the hearing on this question, has himself stated with precision the breach of the 31st of March.

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(1) Law Rep., 5 C. P., 577.
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<sup>(\*)</sup> Law Rep., 4 Q. B., 180.

<sup>(\*) 1</sup> E. & E., 853. 4) 4 C. B. (N.S.), 85.

<sup>(</sup>b) 1 Salk., 198.

<sup>(6) 12</sup> M. & W., 52.

<sup>(1) 6</sup> Q. B., 107. (8) 3 E. & B., 653.

<sup>(9) 9</sup> C. B. (N.S.), 726.

His Lordship then, after stating the other facts of the case, continued:

After the correspondence the plaintiff never stored or attempted to store any cartridges in the building, and I think he was justified in so doing. The cartridges he had stored had been removed against his wish, and he had further received an intimation from the defendant that if he, the plaintiff, did store cartridges there, the defendant would immediately give notice to the authorities, with a view to the seizure of those cartridges. Under these circumstances, I think he was justified in considering that the defendant had evicted him, and that he was not bound again to take possession of the basement story demised to him, and thereupon

he brings his action.

Now, the first question I have to consider is with regard to the covenant of the lessor, that he will at all times keep the premises in fit and proper repair and condition, so that the same may at all times be available by the lessee for the storage, landing, and shipment of cartridges. Upon this, my opinion is that the word "condition" does import a covenant, which has been broken. I think that the effect of the act of 1875 was to render it impossible for the plaintiff to store cartridges in that building if the adjoining part of the building was used for storing gunpowder, and if no license was obtained for the user of the building for the purposes of storing both those kinds of explosives; and when a building is in such a state that the cartridges there stored are liable to seizure, it is not, in my opinion, a building available for the storage of cartridges within the meaning of the covenant. I think that if the defendant had entered into obligations which \*allowed other persons the right to put gunpowder in the adjoining store, and did not obtain a license justifying that storage, the act of Parliament having intervened, he had brought the demised premises into a condition in which they were not fit and proper for the purpose of the demise, and in which they were not within the meaning of the demise available for the purpose of storing cartridges, and, consequently, there is a breach of that covenant.

Then it is said that there is an impossibility to perform the covenant, and that that impossibility was caused by an act of Parliament, and that where that is so the covenantor is relieved from the obligation. Now, in the first place, I am not satisfied that it was impossible for the defendant to get rid of the rights of the lessees, or to put an end to the agreements between himself and his lessees. In the second

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place, I do not find that he ever made the proper application to the Home Office for the license requisite to enable him to carry the terms of the lease into effect. If he had applied for a license justifying the storing of gunpowder and cartridges during such time as the leases to the other lessees and the lease to the plaintiff required the storing of those kinds of explosives at the same time, and that had been refused, the impossibility in that respect might have been made out. But it is not proved that any such application was made, and, in fact, I think it is proved that no such application was made. The applications made by the defendant to the Home Office were of two kinds. The one was for a continuing license to use the magazine for gunpowder, and that of course would not justify the storage of car-The other was, so far as I tridges in the same magazine. can gather, a claim to store cartridges in an unlicensed place by virtue of another section of the Explosives Act. was refused, and he was told he must take the necessary steps to place the cartridges in a place where they could lawfully be stored, and those steps it does not appear he Therefore I am of opinion that he has not shown that he could not have obtained a license which would have removed all difficulty.

But further than that I do not think that this case comes within the class of cases to which reference has been made. The principles which govern it are sufficiently shown by the case of \*Brewster v. Kitchell (1), in which Lord Holt [46] laid down that where H. covenants not to do an act or thing which was lawful to do, and an act of Parliament comes after and compels him to do it, the statute repeals the cove-But in that case the covenant and the act of Parliament were in direct and immediate opposition to one another, and the two could not stand together. Either the act must be overcome by the covenant, or the covenant must be overcome by the act, and the act of course prevailed. The second proposition laid down is, that if H. covenants to do a thing which is lawful, and an act comes in and prevents him, the The same observations apply there, covenant is repealed. and it is impossible that a covenant to do a thing and an act which says you shall not do a thing can stand together, and of course the private agreement yields to the public legisla-In this case, if there is an impossibility, it is an impossibility created by the joint operation of an antecedent bargain entered into by the defendant, and a subsequent act of Parliament which comes in and operates upon that antecedent bargain. In that state of circumstances the act cannot be treated otherwise, or put higher as relieving the defendant, than the act of God, with regard to which it appears clear that in such a case the act of God would not relieve the defendant from liability for non-performance of The law upon that subject appears to me to be very clearly stated by Mr. Justice Willes in the case of Lord Clifford v. Watts (1). He says, "Where a thing becomes impossible of performance by the act of a third person, or even by the act of God, its impossibility affords no excuse for its non-performance. It is the defendant's own folly which has led him to make such a bargain without providing against the possible contingency." In my opinion that principle applies to acts of Parliament where the impossibility is caused by the act of Parliament, and by something done or suffered by the contracting party on which the act of Parliament operates. Therefore, in my opinion, if it were the fact that the defendant is not able to perform his obligation, that would not relieve him.

There remains to be observed that it is not necessary to rely on the covenant to which I have referred. It appears 47] to me that the \*plaintiff has made out his case on the covenant for quiet enjoyment, because the act of the defendant in removing the cartridges of the plaintiff from the demised premises was an eviction or interruption of the enjoyment of those premises done by the lessor himself, and

was a thing against which he had covenanted.

The only question which remains for consideration is the amount of damage. Now with regard to that Mr. North did not address me, and it appears to me the plaintiff has put his claim for damages on the right footing. eviction in March down to Christmas, 1876, he was obliged to store his cartridges in barges which he hired for the purpose at an expense of £685 7s. He has also been put to certain expenses consequent on the necessary removal of the cartridges into those barges. He also charges demurrage on a ship which was detained in consequence of the act of the defendant, but that appears rather too remote, and I do not propose to give any damages in respect of that. pears to me, if I take the sum of £750 as the sum at which I put the damage sustained by the plaintiff, irrespective of the allowance to be made for rent, that will be a proper esti-I propose, therefore, to give damages at £750, less the three quarters rent, which would be £150, and that will make

<sup>(1)</sup> Law Rep., 5 C. P., 577, 586.

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the damages £600. Of course the plaintiff is entitled to the costs of the action.

The defendant appealed. The appeal came on for hear-

ing on the 23d of February, 1878.

North, Q.C., and Langley, for the appellant: no implied covenant that the place shall be fit for the lawful storage of cartridges: Sutton v. Temple ('); Erskine v. Adeane (1). Neither, on the fair construction of the lease, is there any express covenant to that effect, and if there were, the defendant would be released by the act of Parliament. Ogilvie v. Foljambe ('), Stanley v. Hayes ('), are against the Relief on the ground of eviction cannot be ob-

tained on these pleadings: Cawley v. Poole (\*).

\*Swanston, Q.C., and Owen, for the plaintiff: It [48] was the duty of the lessor under his covenants to get a license, and he might have got it under sect. 40, subss. 6 and 7; but if he could not, we say that the act does not relieve him from the consequences of his not fulfilling his bargain to let a place fit for storing cartridges: Brewster v. Kitchell('); Hale v. Rawson('); Brown v. Royal Insurance Company('); Lord Clifford v. Watts('); Baily v. De Crespigny('). We could not apply for a license, for we are not occupiers of the building, sect. 14, and we could not furnish the plans of the top story which would be required. There is a breach of the covenant for quiet enjoyment: Shaw v.

Stenton (").

James, L.J.: This case depends entirely on the construction of the express covenants entered into by the defendant, and if those covenants are not wide enough to enable the plaintiff to obtain all he hoped to obtain, the observation applies which has been made in several of the cases, that it was "his own folly" not to obtain more extensive cove-In my mind it is reasonably clear that the covenant to keep the property in good condition and repair merely relates to its physical condition, and I cannot follow the reasoning by which Mr. Justice Fry arrived at the conclusion that the word "condition" imposed on the lessor an obligation to obtain from the proper authorities all licenses which should be necessary to enable the plaintiff to have the enjoyment of the basement for the purposes for which he

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(1) 12 M. & W., 52.
  (*) Law Rep., 8 Ch., 756; 6 Eng. Rep.,
594.
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<sup>(\*) 3</sup> Mer., 58.

<sup>(4) 8</sup> Q. B., 105. (5) 1 H. & M., 50.

<sup>(°) 1</sup> Salk., 198.

<sup>(\*) 4</sup> C. B. (N.S.), 85. (\*) 1 E. & E., 858.

<sup>(9)</sup> Law Rep., 5 C. P., 577. (10) Law Rep., 4 Q. B., 180. (11) 2 H. & N., 858.

At the time when the lease was granted both partook it. ties were aware that there was pending in Parliament a bill to make further regulations as to the storing of explosive substances, and if the plaintiff intended to be guaranteed by the defendant against any effect which such regulations might have on his use of the demised property, he ought to have insisted upon having stipulations for that purpose inserted in the lease. He did not do so, but chose to take the It turns out that, by reason of the provisions of the risk. act, the plaintiff cannot \*store cartridges in the basement demised to him. That is a misfortune imposed on him by the Legislature, and I can see nothing in the lease to throw upon the defendant the burden which the Legislature has thus thrown on the plaintiff. I am of opinion, therefore, that the plaintiff's claim is utterly unsustainable, and that the defendant has not broken any obligation to which the lease made him liable.

At the hearing an amendment was allowed which appears to me to be of an unprecedented description, as it entirely alters the nature of the case made. The claim was based on the continuance of the relation of lessor and lessee between the parties, the amendment is based on an eviction of the plaintiff by the defendant, entitling the plaintiff to damages. The case of eviction was not raised by the claim, and the defendant had not been called upon to meet it. I am of opinion, however, that there was not any eviction. The mere removal of the cartridges on the 31st of March was no eviction, it could not amount to anything more than an act of trespass, and it was an act of precaution which really was for the benefit The cartridges while in the basement were of the plaintiff. liable to seizure under the provisions of the act, and the defendant removed them to another building that they might not be liable to be seized. Then what passed afterwards was in substance this: The defendant said to the plaintiff, "This space is demised to you, and is at your disposal; you can, if you choose, store cartridges there at your own risk. I shall not prevent your doing so, but if you do so, I must, for my own protection, inform the inspector of it." This is no refusal to allow the plaintiff to store the cartridges upon the premises; anybody is at liberty to inform the inspector that a person is storing cartridges, though it may be an unneighborly act to do so without giving him any warning, and all the defendant did was to give the plaintiff such There was no eviction, nor can it be said that the plaintiff has sustained damage through anything the defendant has done. The plaintiff, it is true, has not been

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able to use the basement for storing cartridges, but the sole reason of this is that he knew they would be liable to forfeiture if he landed them there. He has been obliged therefore to stow them in barges, and has suffered some loss, but it is owing to the act of \*the Legislature, not of the [50 defendant. No default on the part of the defendant has been made out, except a trivial act of trespass, and I am of opinion that there ought to have been judgment for the defendant with costs.

BAGGALLAY, L.J.: I am of the same opinion.

The plaintiff by his statement of claim asks for an injunction to restrain breaches of covenant, and for damages. breach alleged is a refusal to receive and store the plaintiff's cartridges, and the only issue tendered is, was there such a refusal or not. I am of opinion that there clearly was not. so that no case is made entitling the plaintiff to relief on the grounds alleged by his statement of claim. Then at the hearing an amendment was allowed. Now I am disposed to agree with Mr. Justice Fry as to the propriety of allowing that amendment so far as it consisted in setting out the covenant for quiet enjoyment, since both parties relied on it, and it was set forth in the defence. But I cannot regard in the same way so much of the amendment as introduced an allegation as to the removal of the cartridges. I think the defendant merely removed the cartridges in order to protect the plaintiff from incurring a forfeiture, and I do not consider it proper to allow it to be introduced to establish a case of eviction which was not raised in the original statement of claim.

THESIGER, L.J.: I also am of opinion that this appeal The decision in the court below went on must be allowed. the ground that the removal of the plaintiff's cartridges by the defendant on the 31st of March was an eviction. 'I cannot concur in this view. It is a mistake to suppose that a temporary trespass by a landlord, unaccompanied by any intention to put an end to the tenancy, is an eviction. is shown by the form of a plea of eviction given in Bullen and Leake's Precedents of Pleading ('), "That the plaintiff without the consent and against the will of the defendant wrongfully entered into and upon the said messuage and premises and evicted \*the defendant from the posses- [5] sion, use, and occupation thereof, and kept him so evicted thenceforth hitherto." Again, in Wms. Saunders (\*), Mr. Justice Williams says: "And the plea must state an eviction or expulsion of the lessee by the lessor, and a keeping

<sup>(1) 3</sup>d ed., p. 635.

him out of possession until after the rent became due; other-A trespass by the lessor will be no suswise it will be bad. pension of the rent. Therefore where to an avowry for rent the plaintiff pleaded in bar that the defendant, the lessor, with force and arms unjustly and unlawfully entered upon the garden part of the messuage or tenement in the plaintiff's possession, and did then and there with like force and arms unjustly and unlawfully break and pull down the roof and ceiling of a summer house, part of the said premises, and tore up the benches thereon; by means whereof the plaintiff had been deprived of the use of the summer house from, &c., until, &c., this plea was held ill on demurrer, for it states merely a trespass; the plaintiff should have pleaded an eviction; and it would have been for the jury to decide whether the facts stated amounted to one." This shows that in considering whether there is an eviction you must look not merely at the act of entry but to the circumstances of the case, and the intention with which the entry was Here it is plain, first, that the landlord's entry was not intended to put an end to the tenancy; secondly, that it was merely temporary; and thirdly, that it was made only to meet an emergency arising from the recent act which put the plaintiff in danger of criminal proceedings and penalties. The plaintiff himself was so far from treating the removal of the cartridges as an eviction that he treated the tenancy as still subsisting, and brought an action on that footing. So far as the amendment raised the new case of eviction, it ought not to have been allowed, for it changed the whole nature of the action; but supposing the case of eviction to be properly raised, my opinion is that it wholly fails.

Then is there anything to show that the defendant has been guilty of breaches of covenant. It was argued by Mr. Owen that the grant of "full and undisturbed right and liberty to store cartridges therein," and the covenant to keep the premises in proper condition so as to be available for the storing of cartridges, made a sort of warranty against the 52] acts of everybody. But it seems to \*me that these clauses must be read in connection with the covenant for quiet enjoyment, and cannot be taken to mean more than that, so far as regards the physical condition of the premises and the acts of the lessor, the lessee shall have the right of storing cartridges there. Suppose the Legislature to pass an act enacting that cartridges should in no case be stored in a magazine, it could not be contended that the lessor had given a warranty against that, and there is no better reason

for saying that he has given a warranty against the Legislature forbidding the storing of cartridges under certain circumstances.

In construing the covenant to keep the premises in proper condition, the maxim noscitur a sociis applies, and it is clear that it means nothing but physical condition. Legislature had required the floor to be made of a certain thickness, or imposed any other similar condition, it may be that this covenant would have bound the vendor to make the premises comply with such condition; but I cannot find anything in it by which the lessor guarantees liberty to store on this property or imposes on himself the obligation of getting licenses to store there. In spite of the argument addressed to us, I can see nothing to prevent the plaintiff himself from applying for a license. The words used in the act, "magazine" and "store," do not necessarily relate to the whole of a building. Different rooms in a building may be used for different kinds of goods, and if it is wished to use one for storing gunpowder, I see no reason why the occupier of that one may not apply for a license.

Solicitors: Harper, Broad & Battcock; Clarke & Calkin.

Taking land by right of eminent domain, does not excuse a tenant from payment of rent: 17 Eng. Rep., 202 note; 21 Eng. Rep., 37 note.

See Shawmut, etc., v. Boston, 118 Mass., 125.

Where, in consequence of a change of grade in a city street, access to demised premises adjoining the street is rendered inconvenient and the tenant is thereby discommoded and injured, in the absence of any covenant in the lease protecting him from such injury, it is no defence to, and cannot be set up as, a counter-claim in an action to recover rent.

If the injury complained of results from an act done in the lawful exercise of the authority of the municipal corporation and in a proper manner, it is immaterial that it was done by the landlord himself under a statutory provision authorizing the owner in such case to do the work.

If the work is done by the landlord in a negligent manner, to the injury of the tenant, the remedy of the latter is not in a refusal to pay the rent: Gallup v. The Albany Railway Co., 65 N. Y., 1.

A provision in a lease that the rent

shall cease if the premises become untenantable by fire or other casualty, does not extend to the case of a build-ing in the city of New York becoming untenantable in consequence of the greater portion of it being taken down to conform to an order of the corporation for the widening of the street on which it is situate: Mills v. Boehr, 24 Wend., 254.

As to what is and what is not an eviction, see 17 Am. Rep., 62 note, and cases cited.

If the tenant loses the benefit of the enjoyment of any substantial fortion of the demised premises by the act of the landlord, the rent is thereby suspended.

California: Skaggs v. Emerson, 50 Cul., 8.

Billany v. Smith, 4 Delaware: Houston, 113.

Illinois: Lynch v. Baldwin, 69 Ills.,

210; Leopold v. Judson, 75 Ills., 586.

Massachusetts: Colburn v. Morrill, 117 Mass., 262. See Fuller v. Ruby, 10 Gray, 285.

New York: Edgerton v. Page, 20 N. Y., 281, 18 How. Pr., 359; Groton v. Smith, 33 N. Y., 245, 249; People v. Gedney, 10 Hun, 152; Rogers v.

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Ostrom, 85 Barb., 528; Campbell v. Shields, 11 How. Pr., 565; Chatterton v. Fox, 5 Duer, 64; Hegeman v. McArthur, 1 E. D. Smith, 147; Drucker v. Simon, 4 Daly, 53; Lawrence v. French, 25 Wend., 442, 7 Hill, 519.

See McGlachner v. Tallmadge, 37 Barb., 315.

Vermont: Alger v. Kennedy, 49 Verm., 110.

Tunis v. Grandy, 22 Virginia : Gratt., 109.

An eviction is a turning out of possession, or placing the party in such a situation that his voluntary expulsion being inevitable, he voluntarily surrenders the possession to save ex-pulsion: Reasoner v. Edmundson, 5 Ind., 393; Tiley v. Moyers, 43 Penn. St. R., 404; Matteson v. Vaughn, 38 Mich., 373; Vaughn v. Matteson, 39 Mich., 3752 Mich., 758

Where the landlord creates a nuisance near the premises, or is guilty of acts which preclude the tenant from the beneficial enjoyment thereof, provided in such case the tenant shall abandon'the premises by reason thereof: Truesdell v. Booth, 6 Thompson & Cooke, 381; Dyett v. Pendleton, 8 Cow., 728; Gilhooly v. Washington, 4 N. Y., 217; Cohen v. Dupont, 1 Sandf., 260.

See 20 Eng. Rep., 458-9 note. The rule that on eviction from part of the premises the tenant is discharged from the payment of the whole rent until such possession is restored, applies only to cases where the lessor himself wrongfully deprives the tenant of the whole or part of the premises. If part only of the land be recovered by a third person, such an eviction is discharge only of so much of the rent as is is proportion to the value of the part evicted: Tunis v. Grandy, 22 Gratt. (Va.), 109; Seabrook v. Moyer, 9 Pittsb. L. J., N.S., 195, 88 Penn. St. R., 417; Hegeman v. McArthur, 1 E. D. Smith, 147.

Though, where a tenant is evicted before the expiration of his lease, he is thereby absolved from all liability to pay rent from the commencement of the quarter in which the eviction occurred; he may also recover the difference between the value of his lease for the unexpired term and the stipulated rent: Chatterton v. Fox, 5 Duer, 64; Mack v. Patchin, 42 N. Y., 167, affirming 29 How., 20, disapproving Baxter v. Ryers, 13 Barb., 267.

See Gallup v. Railway Co., 7 Lans., 471, 65 N. Y., 1; Townsend v. Nickerson, 117 Mass., 501.

A tenant who has been evicted from a part of the demised premises does not, by the mere fact of his demanding of his landlord a sum by way of rent for the premises from which he has been evicted, waive his right of action for damages for the eviction: Drucker

v. Simon, 4 Daly, 53.
But the act of the landlord must be something more than a mere trespass to have this effect. It must be something of a grave and permanent character, done with the intention of depriving the tenant of the enjoyment of the premises.

Delaware: Billany v. Smith, 4 Houston, 113.

Illinois: Lynch v. Baldwin, 69 Ills.,

Massachusetts: Fuller v. Ruby.

10 Gray, 285.

New York: Morgan v. Smith, 70
N. Y., 587; Edgerton v. Page, 20 N.
Y., 281, 20 How. Pr., 359, affirming 14 How. Pr., 116, 10 Abb., 119; Lounsberry v. Snyder, 31 N. Y., 514, 516; Hegeman v. McArthur, 1 E. D. Smith, 147; Campell v. Shields, 11 How. Pr., 516; Jarvis v. Gunning, 12 N. Y. Leg. Obs., 96; Vattel v. Horner, 1 Hilton, 149.

See Lawrence v. French, 25 Wend., 442, 7 Hill, 519.

Repeated entries by the lessor upon leased premises, and carrying away of crops, cutting down a fruit tree, and removing a cooking stove from the house, although acts of trespass, do not amount in law to an eviction of the tenant: Barlett v. Farrington, 120 Mass., 284.

As there are some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction, but which may be either acts of trespass or eviction according to the intention with which they are done, it follows that whether the acts complained of amount to an eviction depend upon circumstances, and is a question in all cases for the jury.

Illinois: Lynch v. Baldwin, 69 Ills., 210.

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Massachusetts: Colburn v. Morrill. 117 Mass., 262.

A lease of a "building" conveys the land under the eaves, if that land be owned by the lessor.

The erection, by authority of the lessor, of a wall upon land under the eaves of a leased building is a breach of the covenant of quiet enjoyment: Sherman v. Williams, 113 Mass., 481.

Where one leased premises to be used as a distillery, and in order to enable him to so use it was necessary for the lessee to file the lessor's consent to the premises being so used, it was held that a refusal to the lessee to give such consent amounted to a "constructive eviction": Grulenhirst v. Nicodemus, 42 Md., 286.

It has been held that a tenant is bound to pay rent, though deprived of the use of the premises by the public enemy: Pollard v. Shaafer, 1 Dall., 210.

Though the Supreme Court of the United States held the contrary, where the lands were seized as abandoned property by the military: Harrison v. Myer, 92 U. S. R., 111.
But that, under the ordinary cove-

nant to restore the premises to the landlord in good condition, he was not bound to rebuild a house burned by the public enemy: Pollard v. Shaafer, 1 Dall., 210.

In South Carolina, contrary to the common law doctrine, where there is a substantial destruction of the subject matter out of which rent is reserved by the act of God or of public enemies
—i.e., by the casualties of war—the tenant may elect to rescind: Coogan v. Parker, 2 South Carolina, 255.

Where a tenant yields the possession of the demised premises in pursuance, or in consequence, of a judgment for the recovery of possession to the person adjudged to be the rightful owner of the paramount title, it is an eviction, and he is discharged from the payment of rent: Home, etc., v. Sherman, 46 N. Y., 370; Tunis v. Grandy, 22 Gratt. (Va.), 109; Barnes v. Bellamy, 44 U. C. Q. B., 303; Trust, etc., v. Court, 30 U. C. Q. B., 239; McAlpin v. Woodruff, 11 Ohio St. R., 120.

But see Coleman v. Reddick, 25 U. C. C. Pl., 579.

The rule, that a tenant is discharged from the payment of rent by one who 25 ENG. REP. 15 obtains a judgment for the possession of the premises, is not changed by the fact that the judgment in the ejectment suit was obtained in consequence of the tenant's violation of the covenants in his lease. The landlord's remedy is by action for a breach of those covenants: Home, etc., v. Sherman, 46 N. Y., 870.

The fact that the landlord has suffered a decree to be taken for the sale of the demised premises in a proceeding to enforce a mechanic's lien, in violation of his contract to defend the suit, upon which the premises may be sold and the tenant evicted, presents no ground for resisting the collection of rents by the landlord: Leopold v. Judson, 75 Ills., 536.

Where judgment, in ejectment, for the possession of the premises in an action to which the tenant is a party, is entered, the tenant may abandon the premises, leaving the key with his landlord: Home, etc., v. Sherman, 46 N. Y., 870; Tunis v. Grandy, 22 Gratt. (Va.),

But see Morgan v. Smith, 70 N. Y., 537; Hegeman v. McArthur, 1 E. D. Smith, 147.

The sale, by a sheriff, under a decree of foreclosure where no deed has been made, nor suit for possession instituted, is not evidence of an eviction: Reasoner v. Edmundson, 5 Ind., 393.

See note to Edwards v. West, ante,

In a suit between third persons and a lessor, to which the lessee is not a party, a decree was made directing the sheriff to rent out the demised prem-The premises were rented out and the lessee yielded possession of the premises. It was held that as the decree did not direct the sheriff to evict the lessee, and there was no paramount title under which the lessee might have been evicted, his surrender of the possession was not an eviction, so as to release him from the payment of rent: Caldwell v. Pennington, 3 Gratt. (Va.), 87. We doubt the soundness of this case under the authorities before cited.

A tenant, being put out of possession, may defend an action for the rent by proof that he was ousted by one having a title paramount to that of the landlord, although the ouster was not by virtue of a judgment, decree or any legal process; such tenant taking the

burthen of proof that he acted in good faith, and that such title was in fact paramount: Moffat v. Strong, 9 Bosw., 57; Sweetman v. Prince, 26 N. Y., 224, 232.

A tenant is not liable for rent, as such, after the landlord commences summarily to dispossess him for non-payment of rent before due; otherwise as to rent due at commencement of such proceedings: Hinsdale v. White, 6 Hill, 507; Crane v. Hardman, 4 E. D. Smith, 339; McKeon v. Whitney, 3 Den., 452; Wells v. DeSeyer, 1 Daly, 46.

To render an eviction of a tenant a valid defence against the landlord's claim for rent, it must take place before the rent falls due: Giles v Comstock, 4 N. Y., 270; Brooks v. Christopher, 5 Duer, 216; Tiley v. Moyers, 43 Penn. St. R., 404.

The rule is the same, although the rent is payable in advance, and the eviction occurs before the expiration of the period in respect to which the rent claimed accrues: Giles v. Comstock, 4 N. Y.. 270.

A tenant has a right to insist that unless he can have the whole premises leased, he will take nothing and pay nothing; but if he accepts and occupies a part during the term, he becomes liable to pay (upon the principle of a quantum meruit) for that which he has actually occupied under the lease.

Ireland: Simmonds v. Farrell, Irish Rep., 8 C. L., 1, approving Mercer v. O'Reilly, 16 Irish C. L., 296.

Massachusetts: Townsend v. Nick-

erson, 117 Mass., 501.

New York: Knox v. Hexton, 42 N.
Y. Superior Court Rep., 28; Hurlbut
v. Post, 1 Bosw., 28; Kelsey v. Ward,
41 N. Y., 619, reversing 38 Barb., 269,
42 Barb., 582, 16 Abb., 98; Vanderpoel,
v. Smith, 4 Abb. Ct. App. Dec., 461,
affirming 1 Daly, 361.

Pennsylvania: Tiley v. Moyers, 43 Penn. St., 404.

No act of mere negligence or of mere trespass by the landlord, amounts to an eviction: Truesdell v. Booth, 6 Thomp. v. Cooke, 381; Edgerton v. Page, 20 N. Y., 281; Ogilvie v. Hull, 5 Hill, 52.

Vermin or noxious smells in or about the house do not constitute eviction, so as to justify abandonment of the premises by the tenant: Truesdell v. Booth, 6 Thomp. & Cooke, 381; Westlake v. DeGraw, 25 Wend., 669; Vanderbilt v. Perse, 3 E. D. Smith, 428.

One cannot be evicted who has never had either actual or constructive possession.

Where a grantor who has never had actual or constructive possession finds himself excluded from the enjoyment of the property, his substantial remedy is upon the covenants of seisin and against incumbrances: Matteson o. Vaughn, 38 Mich., 373; Id., 39 Mich., 758

Where the plaintiff demised a tract of land to the defendants for a term of years, and reserved to his own use a building thereon till a specified date before the expiration of the term, and, no demand being made by the defendants, continued to occupy the building after the time for which he had reserved it had expired; held, that this did not amount to an eviction by the plaintiff, since the defendants had never been in possession: Vanderpoel v. Smith, 4 Abb. Ct. App. Dec., 461, affirming 1 Daly, 311; Simmonds v. Farrell, Irish R., 8 C. L., 1, following Mercer v. O'Reilly, 16 Irish C. L. Rep., 296.

See also Matteson v. Vaughn, 38 Mich., 373.

Breach of an independent agreement or lease is not an eviction; as where it was agreed that the tenant should have the use of a well and water-closet on another lot, and the tenant was deprived of those by reason of the landlord failing to pay the rent of the same; it was held that this did not amount to an eviction so as to defeat the collection of rent, as they were not named in the lease, but the tenant's right in respect to them grew out of a different contract: Lynch v. Baldwin, 69 Ills., 210; Tunis v. Grandy, 22 Gratt. (Va.), 109; Coleman v. Reddick, 25 U. C. C. Pl., 579; Vattel v. Horner, 1 Hilton, 150; Etheridge v. Osborn, 12 Wend., 529. In Vermont it is held, that if the

In Vermont it is held, that if the landlord covenant in the lease to keep the demised premises in repair and refuse to do so, to such an extent that the tenant is deprived of the substantial use of a material part of the premises, this amounts to an eviction: Alger v. Kennedy, 49 Verm., 110.

Where a landlord agrees to complete an addition to hotel property rented by him, but no time is fixed, and the ten-

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ant is to pay for the principal part of the cost, the latter cannot be allowed damages as against the rent claimed, when it appears he did not pay his part for the work already done: Morris v. Tillson, 81 Ills., 608.

The taking possession of hotel furniture by the landlord, under a chattel mortgage given by the tenant to secure the payment of rent due and to become due, upon default of its condition, is not an eviction of the tenant by the landlord so as to terminate the tenancy and stop the rent; neither will any delay in executing the writ of replevin for the goods, sanctioned by the lessee, or by the officer without authority from the landlord: Morris v. Tillson, 81 Ills., 609.

Merely clearing some rubbish in part of the demised premises would not, per se, be an eviction: Wilson v. Prescott, 62 Maine, 115; Simmons v. Thompson, 1 Handy (Ohio), 521; Thorndike c. Burrage, 111 Mass., 531.

So the mere holding of a ground for a short time after the house erected upon it has been destroyed by fire, for the purpose of removing the wreck of the property, will not deprive the tenant of his right to surrender the lease: Trimingham v. Brine, Tucker's Select Cas. (Newfoundland), 179. See also Banks v. Carter, 7 Daly,

417; Cornell v. Carson, Id., 149; Covill v. McBraire, Id., 193; Newman v. Meagher, Id., 207; Duggan v. Barter, Id., 286; Brown v. Preston, Id., 491.

Non-supply of Croton water, from a leak in the pipe outside of the demised premises, whereby a water-closet and wash-basin on the premises became useless, does not authorize the tenant to abandon the premises: Coddington v. Dunham, 35 N. Y. Superior Ct. R., 412, 45 How. Pr., 40.

See West Side, etc., v. Newton, 76 N. Y., 616, 57 How. Pr., 152.

If a former tenant or other party in possession without right remains in possession, refusing to allow the tenant to enter, the landlord is not liable to the tenant for such wrongful act of such former tenant : Gardner v. Kettletas, 3 Hill, 330; Mechanics, etc., v. Scott, 2 Hilton, 100; Crooks v. Dickson, 15 U. C. C. Pl., 23; Holland v. Vanstone, 27 U. C. Q. B., 15; Carr v. Dunn, 9 id., 46.

But see Imburt v. Hallerby, 23 How.

Pr., 456; Kelly v. Irvin, 17 U. C. C. Pl., 351, disapproved in Holland v. Vanstone, 27 U.C. Q. B., 15; Neale v. McKenzie, 1 M. & W., 763; Lawrence v. French, 25 Wend., 442, 7 Hill, 519; Com. v. Dudley, 10 Mass., 403; Jenks v. Edwards, 11 Exch., 775; Saunders v. Roe, 17 U. C. C. Pl., 344; Thompson v. Glenn, 2 Leg. Chron. Rep., 57; People v. Simpson, 23 How., 481, 37 Barb., 452, 14 Abb., 457, 25 How., 503, 28 N. Y., 55.

So as to acts of strangers: Meeks v.

Bowerman, 1 Daly, 101.

Where the landlord leases premises to a tenant by a parol lease, and afterwards and before the tenant gets possession leases the same premises to another and puts him in possession, the first tenant may either bring an action of ejectment and recover the possession, or he may sue in assumpsit for the breach of the implied covenant for possession and quiet enjoyment: Berrington v. Casey, 78 Ills., 317; Trull v. Granger, 8 N. Y., 115; Gardner v. Kettletas, 8 Hill, 330.

See Lawrence v. French, 25 Wend., 442, 7 Hill, 519.

In a lease of property in the town of London a clause was inserted whereby the lessor agreed to erect the outside of a frame building, and bound himself, in case of its being destroyed by fire, to rebuild to the same extent, or in default the rent reserved to cease. Afterwards the house was burnt down, and in the interval between the execution of the lease and the destruction of the property the municipal council of the town, under the authority of an act of the legislature, passed a by-law prohibiting the erection of a frame build-ing in that locality. The lessee reing in that locality. fused to pay rent until the terms of the lease were complied with on the part of the lessor by his rebuilding, and thereupon the lessor filed a bill to cancel the lease which had been executed, on the ground that it had become impossible for him to carry out the agreement in consequence of the provisions of the by-law. The court refused the relief asked, but, on a submission in the answer, directed a reference to a master to fix a proper rent to be paid. by the lessee upon the lessor rebuilding with brick, with costs to be paid by the plaintiff: Williams v. Tyas, 4 Grant's Chy., 538.

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But see David v. Ryan, 47 Iowa, 642. A covenant in the lease of a wooden building binding the landlord to rebuild in case it burns, is released by the passage of a valid municipal ordinance forbidding the erection of wooden buildings: Cordes v. Miller, 39 Mich., 581.

A lease of an entire building in Boston, which was destroyed by the fire of 1872, is not terminated at the election of the lessor by the passage, after the fire and before the erection of a new building, of the statute of 1872, chap. 371, requiring the new building to be constructed of different materials and in a more expensive manner: Rogers v. Snow, 118 Mass., 118.

See David v. Ryan, 47 Iowa, 642.

At common law the abandonment of untenantable premises constituted no defence to the tenant in an action by the landlord for rent: Graves v. Cameron, 58 How. Prac., 75.

It is no defence to an action to recover rent, either that the premises were unfit for occupancy or became out of repair after the commencement of the term: Davis v. Banks, 2 Sweeney, 184

Where premises are rented with the distinct understanding that they are in good condition, that becomes part of the consideration. Where the consideration of a lease fails, the lessee is justified in leaving and in refusing to pay farther rent: Tyler v. Disbrow, 40 Mich., 415.

A covenant to repair is equivalent to a covenant to rebuild: Fowler v. Payne, 49 Miss., 32, 76, and cases cited.

Where a lease contained a covenant on the part of the lessees to surrender up the possession of the premises at the expiration of the lease, in the same condition they are in at the date of the lease, natural wear and tear excepted, but there is no covenant to repair or rebuild, and the buildings are destroyed by fire during the continuance of the term, it has been held the tenants are not bound to put up new buildings in the place of those destroyed: Warner v. Hitchings, 5 Barb., 666.

But see McIntosh v. Lown, 49 Barb., 550; Schmidt v. Petit, 1 McArthur, 179.

Though the rule does not apply to personal property, as to which a lessee has made a similar covenant: Chamberlain v. Prenmouth, 28 U. C. Com. Pl., 497.

At common law, where buildings upon demised premises were burned after the commencement of the term, the lessee was bound to pay the rent: Gates v. Greir, 4 Paige, 355; Wood v. Hubbell, 10 N. Y., 479; Graves v. Berdan, 26 N. Y., 498; Fowler v. Payne, 49 Miss., 32, 78, and cases cited.

See numerous cases cited, Coogan v. Parker, 2 South Car., 262.

But see Schmidt v. Petit, 1 McArthur 179

thur, 179.

By lease for years, it was provided that if the premises should be destroyed by fire the rent should cease until the landlord should put them in good order and condition, but the landlord did not otherwise covenant to rebuild, and the building was destroyed by fire during the term; held that, as the lessor was not obliged to rebuild by mutuality of obligation, the tenant could not be held liable for rent after the house was rebuilt, unless he elected to enter into possession of the restored premises: Schmidt v. Petit, 1 McArthur, 179.

Where a building has become unfit and unsafe for occupancy by reason of fire or inherent defects, making it dangerous in its condition, the fact of a tenant holding an unexpired term of a lease will not restrain the owner, by an injunction, from taking down the walls and reconstructing the building in such manner as he may deem best to secure safety and permanency: Dawson v. Brouse, 1 Wilson's Superior Ct. R., 441.

Under a lease of an entire building for a term of years, in which the lessee covenants to pay rent "except only in case of fire, or other casualty, and also all taxes and assessments whatsoever, whether in the nature of taxes now in being or not, which may be payable for or in respect of the premises, or any part thereof, during said term;" and which provides that in case of the destruction of the building by fire the rent shall be suspended until the lessor shall rebuild, the lessee is bound for the payment of taxes assessed during the term, after the building is destroyed by fire, although it is not rebuilt: Minot v. Joy, 118 Mass., 308.

See Shawmut, etc., v. Boston, 118

Mass., 125.

Though where it was agreed that the lessee should not be liable for rent on the destruction of buildings upon the demised premises, and a clause to that effect was accidentally omitted from the lease, the same was re-formed accordingly: Wood v. Hubbell, 10 N. Y., 479, affirming 5 Barb., 601.

N. Y., 479, affirming 5 Barb., 601. But see Wilson v. Dean, 74 N. Y.,

A lease from defendant to plaintiff contained a paragraph with three clauses,—1st. In case the premises clauses,—1st. In case the premises should be partially damaged by fire, but not rendered untenantable, the same were to be repaired with all convenient speed, at the expense of the lessor. 2d. In case they were rendered untenantable, the rent was to be paid up to the time of the fire, and then to cease until the premises were put in repair. 3d. In case of total destruction, the lease was to cease upon payment of the rent up to that time, otherwise to remain in force, at the option of The contingency provided the lessor. for by the second clause occurred. fendant determined not to repair but to rebuild, and to terminate the lease. In an action to recover damages, held that it was optional with defendant to continue the tenancy by repairing the premises, or to terminate the lease, and the plaintiff had no cause of action: Witty v. Matthews, 52 N. Y., 512.

Where defendant had leased to plaintiff certain premises consisting of a large room and the cellar under a house for the term of ten years, which building was indicted during the life of the lease as a nuisance, and by order of the court defendant entered upon the premises and caused the building to be taken down, and then caused other buildings of entirely a different character to be built in its stead: Held, that plaintiff might maintain ejectment for the recovery of the premises, if not estopped by his acts, showing that his rights in the premises had terminated: Rowan v. Kelsey, 2 Keyes, 594, 4 Abb. Ct. App. Dec., 125.

See also cases cited in Schmidt v. Pettit, 1 McArthur, 185; Rogers v. Snow, 118 Mass., 118.

But see Schmidt v. Pettit, 1 McArthur, 179.

Though it has been held that where buildings upon demised premises are destroyed after the making of the lease, and the commencement of the term, the lessee was not bound to take the premises or to pay the stipulated rent: Wood v. Hubbel, 5 Barb., 601; Tyler v. Disbrow, 40 Mich., 415.

See McKechnie v. Sterling, 48 Barb., 835; ante, Edwards v. West, p. 64,

and note, p. 71.

At common law, and independently of statute, the lessee of apartments in the upper story of a building, where there is no covenant by either landlord or tenant to rebuild, is discharged from his covenant to pay rent by the burning of the building, so that his enjoyment of the space in air demised to him becomes thereby impracticable: Graves v. Berdan, 26 N. Y., 498, affirming 29 Barb., 100, affirmed 24 How. Pr. R., 610; McMillan v. Solomon, 52 Ala., 356; Shawmut, etc., v. Boston, 118 Mass., 125; Kerr v. Merchants, etc., 8 Edw. Chy., 315.

Edw. Chy., 315.

But see Izon v. Gorton, 2 Arnold's (Eng.) Rep., 39, 7 Scott, 537, 5 Bing. N.C., 501.

Contra in Kentucky: Helburn v. Mofford, 7 Bush (Ky.), 169; Redding v. Hall, 1 Bibb, 536.

A lease of rooms, in a building which provided, that in case of the destruction of the premises by fire, the rent should be suspended or abated, was surrendered to and accepted by the lessor in consideration of three notes made by the lessee, payable to the lessor at different dates. The first two notes were duly paid; before the last note was due the premises were destroyed by fire. Held, that the lessee was liable for the amount of the last note when due: Brooks v. Cutter, 119 Mass., 132.

See also Pulver v. Williams, 3 U. C. C. Pl., 56; Brooks v. Christopher, 5 Duer, 216.

In New York, by statute, it is provided that "The lessees or occupants of any building which shall, without any fault or neglect on their part, be destroyed, or be so injured by the elements or any other cause as to be untenantable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant, and the lessees or occupants may thereupon quit and surrender possession of the leasehold premises, and of the lands so leased or occupied: Laws 1860, ch. 345, p. 592,

4 Edm. St., 433. Similar statutes exist in some of the other states.

The injury to the premises contemplated by this act, to authorize a surrender of possession, must be of a physical nature, such as if done by the landlord would amount to an eviction of the tenant from the whole or part of the demised premises: Fash v.

Kavanagh, 24 How. Pr. R., 347. Where it appeared that the filth from a privy, either on or adjoining the premises, flowed over the apartments occupied by the tenant, without any fault on his part, and rendered them unfit to occupy, the tenant was justified in abandoning them, under the pro-visions of the "act in relation to the rights and liabilities of owners and lessors, and of lessees and occupants of buildings," passed April 13th, 1860: Fash v. Kavanagh, 24 How. Pr. R., 347.

The statute of 1860, allowing a tenant to abandon the demised premises when they become untenantable without any fault of his, does not apply to the letting of the premises with a full knowledge that they are to be rented untenantable, with a view to occupancy while in that condition: Alsheimer v.

Krohn, 45 How. Pr., 127.
The provisions of the act with reference to the rights and liabilities of lessors and lessees (chap. 345, Laws 1860) relieving a tenant from the payment of rent of a building which, without fault or negligence upon his part, shall have been destroyed or so injured by the elements or other cause as to be untenantable, have reference to a destruction or injury resulting from some sudden and unexpected action of the elements or other cause, and not to the gradual deterioration and decay produced by the ordinary action of the elements. It does not affect the common law rule requiring the tenant to make ordinary repairs: Suydam v. Jackson, 54 N. Y., 450; Johnson v. Oppenheim, 55 N. Y., 280; Sheavy v. Adams, 18 Hun, 181; Wheeler v. Crawford, 86 Penn. St. R., 327; Hatch v. Stamper, 42 Conn., 28.

Defendant hired a house from plaintiff, agreeing in the lease to make necessary repairs, and there was no covenant on the part of the landlord to repair. The roof of the house leaked, and the walls were so damp as to create sickness in defendant's family, causing him to abandon the premises. Held,

that this did not amount to an eviction authorizing the tenant to abandon, and he was liable for rent after such abandonment. Held, also, that the provisions of the laws of 1860 (chap. 345) would not avail as a defence to the tenant: Truesdell v. Booth; 6 Thompson & Cooke, 379.

Where a lease contains a condition that in case the demised premises are so damaged by fire as to be untenantable, the rent shall cease until the same shall be put in good repair; the fact that the tenant or a sub-tenant continues to occupy a portion of the premises after a fire, is not of itself conclusive evidence that the premises are tenant-Evidence of the circumstances which induced the tenant to remain is proper: Kip v. Merwin, 52 N. Y., 542. Where buildings on a premises are

destroyed, or from other cause the tenant is deprived of their use, in order to discharge himself from rent he must surrender, or offer to surrender, the entire possession to the landlord, and must v. Parker, 2 South Car., 255; Smith v. Stonykalb, 67 Barb., 66; Johnson v. Oppenheim, 48 How. Pr. Rep., 483, 34 N. Y. Superior Ct. R., 416, 55 N. Y.,

See case between same parties under same lease: 35 N. Y. Superior Ct. R.,

But see Fowler v. Moore, 49 Miss., 32, 79, that he would only be liable for value of rent in the condition of the premises.

A tenant may recoup damages for a breach of the landlord's covenant to repair: Davis v. Banks, 2 Sweeney, 184. See Murray v. Waller, 42 How.

Chapter 345, of the laws of 1860, authorizes the lessee or occupant of any building which shall, without any fault or neglect on his part, or so injured from any cause as to be untenantable or unfit for occuption, to remove therefrom, and relieves him from the payment of rent after the happening of that con-tingency, unless he shall have otherwise expressly stipulated in writing. If the premises were unfit for occupation before the tenant moved in, or if they became so after he removed out, in either case he is equally without the act: Murray v. Waller, 42 How. Pr. R., 64.

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Under a similar statute in New Jersev, it has been held that the statute did not apply to a lease executed before it was enacted : Coles v. Celluloid, etc., 39 N. J. Law, 326, affirmed 40 id., 381.

So in Massachusetts: Rogers v. Snow,

118 Mass., 118.

Where the demised premises are situated in another state, the law of that state governs the rights and liabilities of the parties; and in the absence of a plea and proof by the defendant of some statute of the other state changing the common law rule, the courts of this state must presume that the common law governing the matter is in force in such state: Graves v. Cameron, 58 How. Pr., 75.

## [8 Chancery Division, 53.]

C.J.B., Dec. 21, 1877. C.A., Feb. 28, 1878.

In re Elliott. \*Ex parte Hopper.

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Bankruptcy—Pending Proceedings for Composition—Costs—Varying Provisions of Composition—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 126—Bankruptcy Rules, 1870, rr. 292, 297.

The creditors of a debtor who had filed a liquidation petition resolved to accept a composition of 15s. in the pound, payable in four instalments, to be secured by the joint and several promissory notes of the debtor and a surety. The resolution was registered, and the receiver who had been appointed gave up possession of the estate to the debtor. The promissory notes were delivered to the creditors. When the first instalment became due neither the debtor nor the surety could pay it. Two days before it became due the debtor's solicitor applied to the court for leave to summon a meeting of the creditors for the purpose of submitting a resolution to vary the provisions of the composition. Leave was given, but the receiver was reappointed. A meeting was held, and it was resolved to accept a composition of 8s. in the pound, payable in three instalments, the second and third of which were to be guaranteed by sureties. The resolution was confirmed at a second meeting, but registration was refused, and the debtor was adjudicated a bankrupt. The debtor's solicitor applied to the court to order the costs of the abortive proceedings to reduce the composition to be paid out of the bankrupt's estate, but the application was refused in the county court and afterwards by the Chief Judge:

Held, that the abortive proceedings were not "pending" at the time of the bankruptcy, within the meaning of rule 292 of the Bankruptcy Rules, 1870, and that at any rate the exercise by the county court of the discretion given to it by the rule ought not to be interfered with; and that the proceedings to reduce the composition were not surharized by the data of the county court of the discretion given to reduce the composition were not authorized by the 6th clause of sect. 126 of the Bankruptcy

Act, 1869.

Kz parte Jeffery (1) distinguished.

(1) Law Rep., 9 Ch., 144.

[8 Chancery Division, 60.]

V.C.B., May 24, 1876. C.A., Jan. 18, 19, 1878.

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**[60** 

[1876 W. 26.]

Will-Construction-Gift Original or Substitutional-Issue of Child dead before date of Will.

A testator gave his residuary estate to his wife for life, and after her decease to such of the children of his two late sisters as should survive his said wife and should attain twenty-one or marry, in equal shares; but in case any of such children should

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be dead at his (the testator's) decease, then he directed that such issue should take the share of their deceased parent :

Held (affirming the decision of Bacon, V.C.), that the gift to the issue of deceased children was a substitutionary gift, and that the issue of a child who was dead at the date of the will could take nothing.

Robert Orr, by his will, dated the 9th of August, 1873, after giving certain specific and pecuniary legacies, gave all the residue of his real and personal estate to his wife Margaret Orr and three other persons, in trust to sell and convert into money his said residuary estate, and to pay the income thereof, subject to an annuity of £200 to his niece Mary Anne Cansh (a daughter of his late sister Mary) during her life, unto his wife Margaret Orr during her life, and the will then proceeded as follows:

"And after the decease of my said wife I direct that my trustees shall pay and divide the capital and income of my said residuary estate unto and equally amongst such of the children of \*my late sisters, Margaret and Mary, as shall survive my said wife, and being males shall attain the age of twenty-one years, or being females shall attain that age or marry under that age. But in case any of such children shall be dead at my decease leaving lawful issue, then I direct that such issue shall take (and if more than one, in equal shares as tenants in common) the share of their deceased parent."

The testator died on the 5th of January, 1874. The testator's sister Margaret married W. Mirren, and died on the 26th of August, 1823, having had two children only who attained twenty-one or married, namely, Elizabeth, who married W. Cummings, and was still living, and Mary, who married T. West, and died on the 19th of January, 1868, before the date of the testator's will, having had eight children, of whom six were living, at the death of the testator, and were all still living, two being minors.

The testator's sister Mary Stewart left one child, the said

Mary Anne Cansh, who died in January, 1875.

The action was brought by Frederick William West, one of the infant children of Mary West, against the testator's widow and the other trustees of the will, for the administration of the estate. The defendants demurred, in order to raise the question whether the plaintiff was entitled to any share of the testator's estate under the residuary gift.

The demurrer was heard before Vice-Chancellor Bacon on

the 24th of May, 1876.

Kay, Q.C., and Medd, for the demurrer: The gift to the children of the testator's sisters Margaret and Mary is a gift to a class. In order to qualify them as members of the class

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they must be alive at the date of the will and survive the widow, and must attain twenty-one or marry. Then the testator says that in case of any of "such" children being dead at his decease, their issue shall take the share of the deceased parent. The plaintiff's mother, Mary West, died in 1868, and hence never could have become a member of the class, as she was dead at the date of the will.

It is most clearly settled that where there is a gift of this kind \*to the children of a member of a class, no one [62] can possibly take under a substitutional gift unless the parent was or might possibly be one of the original class.

If the gift had been to the member of a class, "and" to the children of any member of the class, that would have been an original, not a substitutional gift. There would, in fact, have been one compound class. Moreover, here the word is "such"; and the gift is a gift of "the share of their deceased parent," i.e., of the share which their deceased parent would have taken. But this daughter having been dead at the date of the will, could never have taken a share of the residuary estate.

The case is governed by In re Hotchkiss' Trusts (') and Christopherson v. Naylor (1). Other authorities are Butter v. Ommaney ('), Habergham v. Ridehalgh ('), and Hunter

v. Cheshire (').

Sir H. Jackson, Q.C., and E. P. C. Hanson, for the plaintiff: If this case were within Christopherson v. Naylor there is a conflict of authority as to whether that case is binding or not. Vice-Chancellor Malins in In re Potter's Trust (\*) expressly declined to follow Christopherson v. Naylor, and in Adams v. Adams (') he adhered to his opinion, notwithstanding the remarks of Vice-Chancellor James in *In re Hotchkiss' Trusts*.

But, in truth, the case is not within Christopherson v. Naylor. The gift here is original, not substitutional, and that being so, In re Hotchkiss' Trusts is in our favor. "Such" children cannot mean children of the sisters who shall survive; it merely means children of the sisters. other words, testator makes a gift, first, to the children of his sisters who shall survive his wife and attain twenty-one; and, secondly, to the children of any child of his sister who may be dead at his decease: Loring v. Thomas (\*); In re

<sup>(1)</sup> Law Rep., Eq., 648.

<sup>(\*) 1</sup> Mer., 820.

<sup>(\*) 4</sup> Rusa, 78, (\*) Law Rep., 9 Eq., 895, (\*) Ibid., 8 Ch., 751; 6 Eng. R., 592.

<sup>(&</sup>lt;sup>6</sup>) Law Rep., 8 Eq., 52, 58. (7) Law Rep., 14 Eq., 246, 250; 3 Eng. R., 720.

<sup>(8) 1</sup> Dr. & Sm., 497.

Chapman's Will (1). Of the wide construction which the court will put on the word "such" there are examples in

King v. Cleveland ('); In re Philps' Will (').

\*The word "share" must have some meaning given to it; and the only meaning possible is that it defines what the deceased parent would have taken had he or she lived: Bebb v. Beckwith ('); In re Faulding's Trusts ('); Giles v. Giles (\*); Tytherleigh v. Harbin (').

BACON, V.C.: What I am asked to do on behalf of the plaintiff in this case is rather to make a will for the testator than to construe the will according to the way in which the

testator has expressed himself.

I cannot give ear to the suggestion that the testator must be taken to have been acquainted with the fact of his niece's death.

I find that in August, 1873, the testator makes his will; and the present claim is made by a child of a niece who died I have listened with the greatest interest to the many cases which have been cited, in all of which the decisions turned upon the particular words which were used, and which, it may be, are not very easy to reconcile with But there are certain rules of law which must not be infringed or perverted, where it is said that the words of the will are the only guide with which a judge is furnished, or which he is authorized to deal with. Amongst those rules is this: You cannot give a legacy to a dead man; but you may include in your gift the representatives

of a person who may be deceased.

Here then we have a testator, to whom I cannot impute any knowledge that his niece, Mrs. West, was dead, making his will in 1863. If he had any knowledge of the fact, he has not adverted to it in any terms that I can regard. He gives his residue to a class, which at the date of his will consisted of only two persons. He says [His Lordship read the gift of residue, and continued]: There were then in existence two persons who, he supposed, might survive his widow. They alone constituted the class from which the root of title of the persons to take under the subsequent clause must be If at the time of the will there were only two persons constituting the class, and the mother of the plaintiff 64] \*was not one of them, how can I hold that the plaintiff is entitled under the subsequent clause?

<sup>(1) 32</sup> Beav., 382. (2) 26 Beav., 26, 166; 4 De G. & J., **4**77, 480.

<sup>(8)</sup> Law Rep., 7 Eq., 151.

<sup>(4) 2</sup> Beav., 308. (5) 26 Beav., 263.

<sup>6) 8</sup> Sim., 360. (1) 6 Sim., 329.

It is not necessary for me to consider the case of Christopherson v. Naylor (1) The only case to which I find it necessary to refer is Hunter v. Cheshire (1), which is the most recent decision of those which have been cited. Sir Henry Jackson seemed to think that the decision in Hunter v. Cheshire turned upon the meaning of the word "legatee." But the thing decided by Vice-Chancellor Malins, and which was affirmed by the Court of Appeal, was, that the children of a child who died before the date of the will could not take. Here I am asked to include in the subsequent bequest in this will the children of a niece of the testator, who was dead at the date of the will. In construing a clause of this kind one must first ascertain the class referred to, and that class I find to be—children of the testator's two sisters who should survive his widow and attain twenty-one. The testator says "in case any of such children"—still referring back to the children whom he had before defined—shall be dead at his decease leaving issue, such issue shall take. As I cannot find in this will any share or interest which would have been taken by the parent of this infant plaintiff, I cannot find that the plaintiff is entitled to any share at all under the will. In my opinion none of the cases which have been referred to, except Hunter v. Cheshire, have any application. The demurrer must be allowed.

From this decision the plaintiff appealed. The appeal

was heard on the 18th of January, 1878.

Sir H. Jackson, Q.C., and Byrne, for the appellant: In addition to the cases cited before the Vice-Chancellor, they referred to Waugh v. Waugh (\*); Parsons v. Gulliford (\*); Phillips v. Phillips (\*); Martin v. Holgate (\*); In re Sibley's Trusts (\*); In re Smith's Trusts (\*); Smith v. Smith (\*).

\*Kay, Q.C., and Medd, for the defendants, were not [65] called on.

JAMES, L.J.: In this case we are not at liberty to introduce any gift from any sort of notion as to what would have been a proper will for the testator to make, or what we may assume to have been his general intention of dividing his property equally. If the words in the will had been "among such of the children of my late sisters as shall survive me, but in case any of such children shall be dead at my decease

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(1) 1 Mer., 820.
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<sup>(\*)</sup> Law Rep., 8 Ch., 751.

<sup>(\*) 2</sup> My. & K., 41.

<sup>(4) 10</sup> Jur. (N.S.), 281.

<sup>(\*) 10</sup> Jur. (N.S.), 1178.

<sup>(6)</sup> Law Rep., 1 H. L., 175.

<sup>(7) 5</sup> Ch. D., 494; 2 Eng. R., 246.

<sup>(8)</sup> Ibid., 497, n.

<sup>(°) 8</sup> Sim., 353.

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leaving lawful issue, then I direct," then, possibly, it might have been considered that we could have said that this was not a substitutional class. But here the words seem to me to prevent that; and taking the whole of the context without reference to the results (which after all we must do), and taking the plain meaning of the words of the will, namely, "amongst such children of my late sisters as shall survive my said wife," it is quite impossible that in such a clause as that he could have contemplated, in the first instance, children who were already dead. And, seeing that, ordinarily speaking, the gift to a class is a gift to a class of persons living, it appears to me, putting the two sentences together, that the plain grammatical construction of the will is this—"equally amongst such of the children now living of my late sisters Margaret and Mary as shall survive my said wife; but in case any of such children"—that is, any of the children now living—"shall be dead at my decease leaving lawful issue, then I direct that such issue shall take the share of their deceased parent." He is dealing with the class who are living at the date of his will, but who might possibly die between the date of his will and of his own death, and then the whole gift taken grammatically is con-What is somewhat startling is that he does leave out in the plainest possible way the issue of children dying between his death and the death of his wife, and by no possible construction could you let in the whole class of the second generation. You are bound by the express words of the will to exclude the issue of a person dying a day after the testator, because he has said so; and I think you must in like manner follow the words of the will and hold them to mean "such of the children now living as shall survive 66] my wife; but if any of those children shall die \*in my lifetime, then I give it to their issue." I think the Vice-Chancellor's decision must be affirmed.

BAGGALLAY, L.J.: I agree with the Vice-Chancellor in thinking that the testator has expressed himself in intelligible language. It is possible that had we been making the will instead of the testator we might have made provision for other events than he has made provision for, but I see no difficulty in construing this will as it is.

Then, treating the portion of the will with which we have to deal as divided into two clauses, I think it is convenient to consider first what the true construction of the first clause is before we consider whether the second is by way of substitution or an original gift.

Taken per se I see no difficulty in construing this first

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clause. The testator having directed the income of his residuary estate to be paid to his wife for life, says, that upon her death the capital is to be divided equally amongst such of the children of his late sisters as shall survive his wife. Nothing is more clear than that the death of the wife is made the period at which the class taking under that clause are to be ascertained. From the very nature of the case, the persons who were to take were to be the children then living who survived his wife. The gift was only to persons living at the time when the will was made. Having provided that the children who are to be the persons to take the capital as a class when his wife dies shall be the children of his late sisters then living, is there anything unreasonable in saying, "But if any of the persons in whose favor I have made this previous gift shall die in my own lifetime, leaving issue, I substitute their issue for them"? It is perfectly clear and intelligible, leading no doubt to the capricious result that a child of a sister who survived the testator, but died before his wife, if the wife survived him, would be excluded. those accidental results are frequently not present to the minds of testators when they are framing their wills.

Then, having thus arrived at the true construction of the first class, the second, as I have suggested, seems to me to be perfectly clear. It is a substitutional gift in favor of the issue of any of \*those children who should die in his [67 own lifetime. I see nothing upon the face of the will—and from what appears upon the face of the will we are at liberty alone to draw any inference on this point—to show that he contemplated no other result than his wife surviving him. No doubt in fixing the original gift he did contemplate his wife taking a first life estate, but there is nothing whatever to show that when he was making provision for the case of any of the children dying in his own lifetime he was then limiting it to the case in which his wife should survive him. It would lead to almost a ridiculous result had that been

his intention.

But then it is suggested you are to read the second class, not as substituting the issue of a deceased child for the child who would have taken under the previous gift, but you are to treat it as a separate gift, as in fact creating together with the first class a compound class composed in part of children of his deceased sisters, and in part of the issue of children of deceased sisters. Several cases have been referred to in which there has been but one class, and from the peculiar phraseology in which that one class was described, it has been held to be a compound class, composed of chil-

dren and the issue of children; but no case has been cited at all approaching that which we are now dealing with. we were to hold it so in this case it would lead to the extraordinary result, that for the purpose of ascertaining the compound class you are to have regard to two different periods, for one portion of the class was to be composed of the children of the testator's late sisters who should be living at the death of his wife, and the other should be composed of the children of deceased sisters who should die before the testator. I find nothing whatever in this will which at all indicates that the testator contemplated that the class of beneficiaries should be ascertained at two different periods, which must be the result if that construction is adopted.

Therefore it is not necessary to consider Christopherson v. Naylor (') and the variety of other cases to which reference has been made, because we have got here an element which relieves us of a great difficulty which arose in those 68] cases, namely, the fact \*that the testator has in his will indicated two different periods. In Christopherson v. Naylor (1), and almost every other case where the question of substitution has arisen, you find only one period at which both portions of the class are to be ascertained—either the

decease of the testator or the period of distribution.

It appears, therefore, to me, on a fair and reasonable construction of this will, that what the testator intended was, that those children of his deceased sisters who survived his wife should take the capital of the estate; but as regards any of those who were living at the time when he made his will, but subsequently died before his decease, there should

be substitution of their issue.

THESIGER, L.J.: I am also of opinion that the judgment of the Vice-Chancellor should be affirmed. I am far from saying that the principles of construction thus adopted are such as in this case or in the majority of cases really effectuate the intentions of the testator; but I feel strongly on the one hand the danger of speculating on the intention of testators apart from the language used by them, and on the other hand the inconveniences which arise from unsettling principles of construction which have been clearly laid down, and for a considerable time consistently followed, and I agree entirely with what Lord Justice James, when Vice-Chancellor, said in In re Hotchkiss' Trusts (1), as to the unseemliness of courts of co-ordinate jurisdiction coming to contrary decisions in similar cases. Whatever has been

<sup>(1) 1</sup> Mer., 320.

<sup>(2)</sup> Law Rep., 8 Eq., 643.

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said as to the decision in the case of Christopherson v. Naylor, that decision has been followed by a long bead-roll of authorities, subsequent in point of time, as well as prior, to the decisions of Vice-Chancellors Stuart and Malins, impugning that decision, and has been upon two, if not more, occasions cited without disapproval in the Court of Appeal in Chancery, to the position and jurisdiction of which this court has succeeded. Under such circumstances I do not feel myself at liberty to question the principles of decision which were laid down in that case, and which form the foundation of the judgment in it.

Coming, then, to the wording of the present will, in the first \*place, I read the words "unto and amongst such [69] of the children of my late sisters Margaret and Mary as shall survive my said wife," as importing a class made up of children of his sisters Margaret and Mary living at the date of the will, pursuant to the recognized principle of law that in the case of a gift to a class the testator, in the absence of expressions showing a contrary intention, must be supposed to include only living objects, the vesting of the gift in the present case being made contingent on the children surviving the wife.

In the second place, I read the words "in case any of such children shall be dead at my decease," as referring to the antecedent clause, and therefore as equivalent to the words "in case any of the children living at the date of my will

shall be dead at my decease."

In the third place, it appears to me that the gift to the issue must be read as substitutional and not original, for it speaks of the issue referred to taking the share of their deceased parent, and also refers to a period differing from that

which had been previously mentioned.

Finally, therefore, it follows as a consequence of the gift being substitutional and not original that only such persons can take as can show that their parents formed part of the original class. Here the appellant's mother was dead at the date of the will, and therefore did not form one of the original class.

Solicitors: M. K. Braund, agent for J. T. Ray, Bradford, York; Maples, Teesdale & Co.

Bonnewell v. Jenkins.

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[8 Chancery Division, 70.]

FRY, J., July 24, 1877. C. A., Jan. 25, 1878.

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\*Bonnewell v. Jenkins.

[1876 B. 521.]

Contract by Letters-Acceptance-Reference to formal Contract.

The defendant placed a leasehold property in the hands of a house agent for sale. The plaintiff wrote to the agent, "In reference to J.'s property in Fleet Street, I think £800 for the lease, fixtures, &c., is about what I should be willing to give. Possession to be given me within fourteen days from date. This offer is made subject to the conditions of the lease being modified to my solicitor's satisfaction." Shortly afterwards the agent wrote back, "We are instructed to accept your offer of £800 for these premises, and have asked J.'s solicitor to prepare contract." The required modification in the lease was procured:

Held, by Fry, J., and by the Court of Appeal, that, notwithstanding the reference

to a future contract, the two letters constituted a complete contract.

Rossiter v. Miller (1) distinguished.

This was a purchaser's action for specific performance.

The defendant being owner of a leasehold property, placed it in the hands of Fox & Bousfield, estate agents, for sale by auction. The sale by auction did not come off, but the property remained in the hands of the estate agents for sale.

On the 26th of February, 1876, the plaintiff having seen an advertisement of the property, wrote to Fox & Bousfield

as follows:-

"In reference to Mr. Jenkins' premises in Fleet Street, I have gone into the matter, and, considering that the rent was very considerably raised last year when the lease was granted, I think £800 for the lease, fixtures, fittings, &c., excluding good-will, is about the price I should be willing to give. Possession to be given me within fourteen days from date, and all outgoings paid by vendors up to Lady Day next. This offer is made subject to the conditions of the lease being modified to my solicitor's satisfaction, which I am informed can be done. Kindly let me hear from you as soon as possible."

Bousfield saw the defendant, received authority from him 711 to \*accept the offer, and on the 3d of March wrote to

the plaintiff as follows:—

"167 and 168 Fleet Street.

"We are instructed to accept your offer of £800 for these premises, and have asked Mr. Jenkins' solicitor to prepare contract."

No further contract was signed, but the vendor procured
(1) 5 Ch. D., 648; 22 Eng. R., 382; reversed, 24 Eng. R., 684.

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an alteration in the lease to the satisfaction of the purchaser's Disputes having arisen, the vendor ultimately refused to complete. The purchaser then commenced an action for specific performance, and the question was whether the above letters made a binding contract.

The action was heard before Fry, J., on the 24th of July,

1877.

North, Q.C., and W. Barber, for the plaintiff, referred to Bailey v. Sweeting ('); Warner v. Willington ('); Crossley v. Maycock (\*).

Cookson, Q.C., and Dauney, for the defendant.

North, in reply.

FRY, J.: It is said that the statement, "We are instructed to accept your offer of £800 for these premises." is an acceptance only of one of several terms contained in the letter of the 26th of February. Now, in my view, the true rule for construing an instrument is to consider what the writer must have conceived that the reader would understand from it. What, then, in this case, would Mr. Bousfield conceive that Mr. Bonnewell would understand to be the effect of his letter? After having enumerated all the terms which constituted his proposal, he speaks of the whole as connstituting one offer, because he says, "This offer is made subject to," &c. Mr. Bonnewell's conception, therefore, was that he had made one offer, and one offer only, and when Mr. Bousfield replies that he is "instructed to accept your offer of £800 for these premises," I think he is referring to the offer made in that letter of the 26th of February, describing it by reference to its most material term, namely, \*the amount of money to be paid for the premises. think, therefore, that he intended, and must be deemed to have intended, to accept in an unqualified manner the offer contained in the letter of the 26th of February. No doubt that is followed by this statement: "We have asked Mr. Jenkins' solicitor to prepare contract." Now if the matter were not covered by decision, it is very probable that I should feel myself drawn to the conclusion that wherever there is a reference to a future contract the letters themselves do not constitute a contract, and for this very obvious reason, that a reference to a contract as a future thing seems to negative the notion of the existence of a contract as a present thing. But it is too late for that argument to be used before me successfully, when a long series of cases has established this proposition, that the mere reference to a future

<sup>(\*)</sup> Law Rep., 18 Eq., 180; 9 Eng. R., 727. (1) 9 C. B. (N.S.), 843.

contract is not enough to negative the existence of a present one; and that principle has been very clearly expressed by the present Master of the Rolls in the case of Crossley v. Maycock ('), which, as far as I know, is the last case upon the His Lordship there says: "The principle which governs these cases is plain. If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party making it, or by his solicitor, then until those conditions are accepted there is no final agreement such as the court will enforce." I am, therefore, bound to inquire to which of these two categories the present acceptance belongs, and I come to the conclusion that it is a simple acceptance of the offer made by the plaintiff, accompanied by a mere statement of an intention that that arrangement shall Therefore, having regard be reduced into a formal contract. to the authorites, I am not at liberty to come to any other conclusion than that the letters constitute a binding contract.

The defendant appealed. The appeal was heard on the

25th of January, 1878.

73] \*Cookson, Q.C., and Dauney, for the appellant: We contend that there is in the letter of the 3d of March no acceptance of all the terms in the letter of the 26th of February, but only an acceptance of the price. The duty of the estate agent was to find a purchaser, not to bind the vendor by an open contract; and we contend that on the true construction of the letter he did not purport to do so, and that there was to be no bargain till the final contract was signed: Chinnock v. Marchioness of Ely('); Brogden v. Metropolitan Railway Company('); Honeyman v. Marryat('); Crossley v. Maycock('); Winn v. Bull('). The observations in Rossiter v. Miller(') and Ridgway v. Wharton(') are strongly in our favor.

North, Q.C., and W. Barber, for the plaintiff, were not

called upon.

James, L.J.: I am clearly of opinion that the order of Mr. Justice Fry ought to be affirmed. Whether there is a binding contract or not depends on the construction of two

<sup>(1)</sup> Law Rep., 18 Eq., 180; 9 Eng. R., 727. (2) 4 D. J. & S., 638. (3) 5 Ch. D., 648; 22 Eng. R., 379. (4) 5 Ch. D., 648; 22 Eng. R., 382.

<sup>(3) 2</sup> App. Cas., 666; 20 Eng. R., 171. Reversed, 24 Eng. R., 684. (4) 21 Beav., 14; 6 H. L. C., 112. (1) 6 H. L. C., 238, 268.

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letters. It is settled law that a contract may be made by letters, and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain. There are indeed cases, such as Rossiter v. Miller, where the court may hold that the reference to the future contract is such as to show that the parties did not intend to be bound until it was signed, but such cases depend on their own special circumstances. Here there is an unconditional acceptance by the defendant of the plaintiff's offer, and the reference to the preparation of a formal contract appears to me to be immaterial.

BAGGALLAY, L.J.: The question is whether these letters constituted a binding contract. Mr. Cookson referred to the remarks of Lord Justice \*James in Rossiter v. [74 Miller ('). I entirely concur in those observations, but I do not think that they are applicable in the present case. If the defendant's letter had stopped at the end of its first part, no doubt could have been entertained that there was a contract; then follows the reference to the preparation of a formal contract. The signature of such a contract may be made a condition precedent to the existence of any binding bargain, but the letter must be expressed in such a way as to show clearly that such a condition is intended, and that is not the case here. The condition as to the modification of the lease was complied with before the end of March, and the contract then ceased to be conditional.

Thesiger, L.J.: I am entirely of the same opinion. The principle established by the authorities is, that a simple acceptance by letter of a written offer to purchase may constitute a contract to sell, although it refers to the preparation of a more formal contract. It was argued here that all that was done was to agree to the price offered, leaving the other terms of the purchase to be settled by future arrangement; but the letter does not merely refer to the price, it says, "Accept your offer of £800," i.e., "Your offer by which you propose to purchase the property for £800 upon certain terms." The mere reference to the preparation of an agreement by which the terms agreed upon would be put into a more formal shape does not prevent the existence of a binding contract.

Solicitors: J. D. Blake; J. B. May.

(1) 5 Ch. D., 648; 22 Eng. R., 882. Reversed, 24 Eng. R., 684,

See 20 Eng. R., 200, 203 note; 22 be transferred by mere delivery, there must be an intention so to transfer accompanying the delivery, Where the

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none the less a contract because the

intention is to have a written assignment, a mere manual delivery does not pass title: Strause v. Josephthal, 77 N. Y., 622.

An agreement actually carried out is

parties differed as to its terms when they tried to state them in writing, and carried it out without doing so: Peek v. Miller. 39 Mich., 594.

## [7 Chancery Division, 75.] V.C.M., Jan. 18. C.A., Jan. 21, 1878.

#### **75**1 \*In re REGENT UNITED SERVICE STORES.

Winding-up-Service of Petition-General Order, November, 1862, r. 3-Service on Solicitor.

A winding-up petition having been presented by a creditor, the solicitor of the petitioner informed the secretary and one of the directors of the fact. The whole of the directors then met, the petitioner's solicitor being present, and passed resolutions assenting to the appointment of their secretary as provisional liquidator without prejudice to the right of the company to assent to or dissent from the proceedings of the petitioner, and that C., the solicitor of a mortgagee of the share capital, should be instructed to take such steps as might be necessary in the interest of the company in relation to the foregoing resolution. C. accepted service of the petition, and appeared for the company on the motion for the appointment of an interim liquidator. The petition was not served at the office of the company. Some days after this a meeting of the company was held at which resolutions were passed that the company should be wound up voluntarily, and that P., the solicitor to the company, should be instructed to carry out the negotiations as to the winding-up. There was no previous resolution appointing P. the solicitor. The petition came on to be heard before Malins, V.C., and counsel instructed by P. opposed on behalf of the company. A winding up order having been made, notice of appeal was given by P. on behalf of the company:

Held, by Malins, V.C., and on appeal, that as service of the petition had been accepted on behalf of the company by a solicitor duly appointed for that purpose, service at the hffice of the company was not necessary:

Held, also, by the Court of Appeal, that P. had no authority to represent the company on the appeal.

THE Regent United Service Stores, Limited, was incorporated on the 17th of November, 1874. Its registered office was in Regent Street, where its business was carried on. The quorum of directors was three, and at the time when the present proceedings were about to be instituted there were only three directors. Two clear days' notice of a

meeting of directors was required.

On the 27th of December, 1877, a creditor presented a petition for a winding-up order. On the same day the petitioner's solicitor, Mr. Rooks, saw the secretary and one of the directors, and informed them of the presentation of the petition, and asked whether the company would consent to the appointment of a provisional liquidator. He was informed on the following day by a letter from the secretary that the company would consent to the appointment of the secretary as provisional liquidator, and that \*notices had been sent out for a board meeting on the 29th.

meeting was held at Bucklersbury, where one of the directors had offices. All the directors were present. Mr. Bilby, the secretary, and Mr. Coburn, the solicitor of a mortgagee of a large part of the assets, including the share capital, were also present, and a clerk of Mr. Rooks attended. The following resolutions were passed and entered in the minutes:—

"That the directors agree to the appointment of Mr. R. W. Bilby as provisional liquidator. This resolution to be without prejudice to the rights of the company to assent to or

dissent from the proceeding taken by Mr. Rooks.

"That Mr. Coburn, with the consent of Mr. Bowerman, be instructed to take such steps as may be necessary to the interest of the company in relation to the foregoing resolution, it being considered to the interest of the company that Mr. Coburn should so act, he being solicitor to the mortgagee of the share capital."

At the same meeting Mr. Rooks' clerk was told to take the petition when received from the office to Mr. Coburn, who would accept service of it. It was accordingly taken to Mr. Coburn on the same day, and he accepted service of it, and undertook to appear on behalf of the company.

On the 31st of December a motion for an interim liquidator was made before Mr. Justice Fry. Counsel instructed by Mr. Coburn appeared for the company, and the order was

made by consent.

On the 14th of January a meeting of the company was held, at which resolutions were passed to the effect that the company should be wound up voluntarily; that the solicitor of the company should apply to the court to allow the petition to stand over to allow a voluntary winding-up subject to the supervision of the court; that a meeting should be held fifteen days from that day, to confirm these resolutions; and that Mr. Pulbrook, the solicitor to the company, should be instructed to carry out the legal negotiations in winding up the affairs of the company. Mr. Pulbrook had on some previous occasions acted as solicitor to the company, but no resolution appointing him was produced.

The petition came on for hearing before Vice-Chancellor

Malins on the 18th of January.

\*Higgins, Q.C., and Bardswell, for the petitioner. [77 Locock Webb, Q.C., and Dundas Gardiner, J. Pearson, Q.C., and Langworthy and Oswald, for other parties, supported the petition.

Glasse, Q.C., and Boome, instructed by Mr. Pulbrook on

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behalf of the company, and *Brooksbank*, for a shareholders' committee of investigation, opposed.

No counsel instructed by Mr. Coburn appeared for the

company.

H. Burton Buckley, for a bond creditor.

Malins, V.C.: I am sorry that any solicitor should have thought it worth his while to take the course that has been taken in opposition to this petition, a petition presented so long ago as the 27th of December last, to wind up a company which I am satisfied is in such a state of hopeless in-

solvency that it cannot go on with its business.

The petition is presented by Mr. Henderson, the holder of an acceptance of this company falling due on the 10th of September, 1877. Mr. Henderson, being the holder of this bill of exchange, is, I must presume, the holder of it for value, and if there were any doubt about that, the proper course would be to bring the money into court. Henderson, however, being the holder of this acceptance of the company, has been unable to obtain one penny from the company. I am also satisfied, from what has taken place before me, that the landlord has distrained for his rent, and is in possession of the premises and the property upon them.

In this state of things what ought to be done? There is no valid objection raised to the petition. I have here a petitioner who cannot obtain payment of his debt, no offer is made to pay it, and I am satisfied there are no means of paying it; no offer is made to pay the creditors who are represented by Mr. Locock Webb, and there is no offer, as far as I can understand, to pay the landlord his rent. then, is the objection? Mr. Glasse says he appears for the company, but I do not know that Mr. Glasse really does appear for the company. I have had no resolution read appointing Mr. Pulbrook solicitor of the company, but I 78] have \*had a resolution read appointing Mr. Coburn. Now, what is the ground of objection? It is only this, that the petition was not left at the offices of the company; but is anybody ignorant of the fact that the object of presenting the petition is to obtain payment of the petitioner's The company know that they are insolvent, and what, therefore, do they want with this service? I am surprised at Mr. Buckley, who admits that there must be a winding-up order made, saying that a copy of the petition must be left at the offices of the company, although the necessity has been obviated by a solicitor appearing for the company when the interim order was made. What harm will be done by the order to wind up! If I were to put it off

until next Friday, it is perfectly certain that I should be compelled to make the order then, because it is a matter of absolute right to all these creditors to have the company wound up. What do I care about the opposition of Mr. Brooksbank's clients, who are shareholders? What right have shareholders to oppose this winding-up? If they will find money to pay the creditors, I will listen to them, but, until they do that, I cannot pay any attention whatever to

their opposition.

Therefore, seeing the miserable state of insolvency which this company is in, and seeing that the petition has been duly served upon the solicitor of the company for the time being, I consider this opposition to be a mere solicitor's opposition for the purpose of seeing what business can be made out of it. As to the other topic that has been alluded to, and upon which I have been addressed again and again, that this is the fifteenth petition in my list, and has therefore come on unexpectedly, it is quite competent to me to hear any petition in my paper at such time as I may think fit. It appears to me, therefore, that this is a petition on which for the benefit of all parties I ought to make an immediate order to wind up this company compulsorily.

The company, by Mr. Pulbrook as their solicitor, appealed. The appeal was heard on the 21st of January, 1878.

Glasse, Q.C., and Boome, for the appeal: There was no good service, the petition not having been left at the office of the company as provided by Gen. Ord., Nov. 1862, r. 3. \*It was decided under the former act that service on [79 the solicitor was not enough: Re Trent Valley, &c., Railway Company ('). The petition was irregularly heard, hav-

ing been taken among the unopposed petitions.

Higgins, Q.C., and Bardswell, for the petitioning creditor: The petition was properly served. The rule referred to is merely directory, and when service was accepted by a solicitor appointed for the purpose at a board meeting at which all the directors were present, nothing more was requisite: Emerson v. Brown (\*); Giles v. Hemming (\*); In re Panonia Leather Cloth Company (\*). Mr. Coburn having been duly appointed to represent the company in the matter of the winding-up, the appellant has no locus standi. Mr. Pulbrook does not represent the company.

<sup>(1) 3</sup> De G. & Sm., 11. (2) 7 Man. & G., 476.

<sup>(3) 6</sup> Dowl., 325. (4) 13 W. R., 1015 n.

Locock Webb, Q.C., and Dundas Gardiner, J. Pearson, Q.C., and Langworthy, H. Burton Buckley, and Brooksbank, appeared for other parties.

Glasse, in reply.

BAGGALLAY, L.J.: The question involved in this appeal, if the appeal can be properly entertained, is as to the service of the petition. But a preliminary objection is taken by Mr. Higgins, on the ground that the alleged appellant has no locus standi. The two subjects are so intimately mixed up with each other, that I propose to deal with them together. The petition was presented on the 27th of December, 1877. The company had its registered place of business in Regent Street, but occasionally, if not frequently, it met for the transaction of its general business in Bucklersbury, where one of the directors carried on his private business. On the second day after the day on which the petition had been presented, all the directors of the company assembled together at Bucklersbury. There were present also Mr. Bilby, the secretary of the company, a gentleman of the name of Bowerman, who had formerly acted as solicitor of the company, and a gentleman of the 80] name of Coburn, the \*solicitor of the mortagee of a large proportion of the company's assets. The meeting was further attended either by the solicitor for the petitioning creditor, or by a clerk representing that solicitor. stated at the meeting that it was very desirable that an interim liquidator should be appointed, and it was suggested that if no objection was raised to the appointment of an interim liquidator, the petitioner would be willing to accept the secretary of the company as such liquidator. Thereupon a resolution was come to in the presence of all three directors (although the minutes state that one did not take part in the voting) that an interim liquidator should be appointed, and that the secretary of the company should be such interim liquidator; and instructions were given to Coburn, who up to that time had been the solicitor of the mortgagee, to take such steps as might be necessary in reference to the foregoing resolution.

Now, it appears to me idle to suppose that this did not mean that Coburn was to represent the company in the matter of the winding-up petition. No doubt the directors reserved to themselves liberty as to what course they might ultimately take with regard to the petition when brought to a hearing; but we are not now considering whether Coburn acted according to his duty or without sufficient authority when the petition was brought to a hearing, but whether he

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was sufficiently instructed on behalf of the company through the directors to represent the company. It appears to me that after that resolution it would be impossible to say that Coburn did not receive sufficient authority from the directors

to accept the service of the petition.

There is no doubt that the 3d rule of the General Order of November, 1862, provides for a service being made at the registered office of the company, if there be any such registered office; but that is not an imperative rule, which is never to be deviated from. I think that the general tendency of all the authorities is to show that if there is such a service as gives full and complete information to everybody to whom information ought to be given, it is sufficient, although provisions and rules of this kind, which are not part of the act of Parliament, but are merely made for the purpose of carrying it into effect, may not have been literally complied with. If that be the case, and if Coburn was by the resolution of the directors sufficiently appointed [8] the solicitor of the company for the purpose of accepting service of this petition, I cannot understand upon what ground it can be alleged that any other service was necessary.

Then arises the point that Mr. Pulbrook, claiming to act as the solicitor of the company, gives on its behalf a notice What authority had Mr. Pulbrook to represent the company? It does not appear from any resolution that Mr. Pulbrook was the solicitor of the company acting at the time when this petition was presented, but reliance is placed upon what took place at the meeting on the 14th of January. I think, however, that the resolution which was passed at that meeting altogether displaces the position which Mr. Glasse has been instructed to assume as representing the company on the present application. The resolution passed (it was a meeting of the shareholders of the company) was this: "That as it appears to this meeting that the assets of the company are sufficient to meet its liabilities, it accordingly instructs its solicitor to apply to the court to allow the petition to stand over, and to allow a voluntary winding-up subject to the supervision of the court."

Now, I think that if Mr. Glasse has any right to appear here, it would rather be as counsel for the shareholders present at that meeting, on whose behalf he made the application to the court to allow the petition then to stand over. But upon what possible ground could it be asked that the petition should stand over? Every one of the shareholders present at that meeting had had the general information con-

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veyed to them by the advertisement of the winding-up petition. But even if those shareholders who had attended that meeting had a *locus standi* to appear upon the petition and to oppose it, or ask that it might stand over, that would not at all affect the question of the service of the petition, which is the only question here. Certainly, if it were necessary to decide the question, I should be of opinion that Mr. Glasse is not duly authorized to represent the company on the present occasion; but I prefer rather to rest my decision on the ground that there appears to me to have been a full and sufficient service of the petition.

82] \*Thesiger, L.J.: I am of the same opinion. The first objection taken on behalf of the company is that the Vice-Chancellor had no jurisdiction to make this winding-up order in consequence of the provisions of rule 3 of the General Order of November, 1862, not having been com-

plied with.

Now there have been a great number of cases decided, both at common law and in chancery, in which the distinction has been recognized between provisions contained in acts of Parliament (and the same observations would apply to rules made part of acts of Parliament), which are merely directory, and those which are made by the Legislature an absolute condition precedent necessary to the validity of any proceedings to which those provisions refer. And I may say from my own recollection, having had occasion not more than a year ago to go rather carefully into the cases upon this point, that the tendency of the court has been to hold provisions such as those contained in the rule to which I have referred to be merely directory, except in cases where it is further provided that in the event of their not being complied with subsequent proceedings shall be invalid.

The recent case of Reg. v. Ingall (') illustrates this view. That case arose under the Metropolis Valuation Act of 1869, in which there are to be found a series of very distinct provisions, first as to the lodging of the valuation list and the time within which that lodging shall take place, and then as to the proceedings before the assessment committee and the time within which they shall take place. Those provisions are followed by provisions relating to appeals to special sessions and to the assessment sessions. In the case to which I refer the provision as to time had been entirely disregarded, the valuation list had not been prepared by the overseers at the proper time, and the assessment committee

had not sat at the proper time. An objection was taken on appeal to the assessment sessions that the valuation list was wholly invalid in consequence of the provisions of the act of Parliament not being complied with, and it was strongly urged in favor of that view that the effect of disregarding times mentioned in the act of Parliament was this, that practically the appellants, although they \*had the [83 power of appealing to the assessment sessions, had been deprived of the power which they were entitled to exercise under the act of Parliament (although it is not often exercised) of appealing also to the special sessions, but the court of assessment sessions held that the valuation list was good, and that the provisions, although very clear and distinct in their terms, were directory only, and that view was affirmed

on appeal by the Court of Queen's Bench.

Now, in the rule upon which the question turns, we find no words expressly invalidating the proceedings on the petition in the event of this particular provision not being complied with, and I am clearly of opinion that compliance with this rule is not an absolute condition precedent to the validity of the winding-up proceedings. That being so, I am of opinion that in the present case the Vice-Chancellor had I found my view upon these reasons. The jurisdiction. company seems to have been represented up to a certain time, and to a limited extent, by a gentleman of the name of Pulbrook as solicitor, subsequently a gentleman of the name of Bowerman was appointed, and upon this petition being presented notice was brought to the directors of the existence of the petition, and a meeting was called of the directors to consider what should be done on behalf of the company. Now, if the directors had not all been present at the meeting, it would have been questionable whether Coburn had authority to represent the company, since two clear days' notice of the meeting had not been given as required by the articles. The meeting was held at the office of one of the directors of the company, and it seems to me to be utterly immaterial whether previous meetings had been held there, for there is nothing in the articles of association, nothing in the statutes, nothing in the general law applicable to the subject, which prevents directors from holding their meetings at such places as they think proper. find that a meeting of the whole body of directors is held; they pass resolutions under which they appoint Mr. Coburn solicitor, and it is clear to my mind that, under the resolutions so appointing him, Mr. Coburn had full authority to represent the company in the winding-up proceedings. Ac-

cordingly Mr. Coburn, when the motion for an interim liquidator was made, appeared by his counsel, and the 84] \*company, as it seems to me, was upon that occasion duly represented. That being so, all questions as to whether the provisions of rule 3 of the Order of November, 1862, were complied with seem to me to be at an end. The Vice-Chancellor had the proper parties before him, and no objection was taken on the part of the company to his hearing the petition. The Vice-Chancellor has heard it, he has made his order upon it, and it seems to me that he had full jurisdiction to make such order.

The other objections have been dealt with by Lord Justice Baggallay, and I have nothing to add to what he said upon those points, except that I entirely concur with the view he

has taken.

James, L.J.: Although I was not here at the beginning of this case, I have heard enough of it to justify me in saying that I most unhesitatingly concur in the decision that has been come to.

The appeal was dismissed with costs, to be paid by Mr. Pulbrook.

Solicitors: Pulbrook; Rooks & Co.; Coburn; Swan & Co.; Tilsley; Rushworth.

[8 Chancery Division, 84.]
C.A., Jan. 80; Feb. 13, 1878.
LONDON SYNDICATE V. LORD.

[1876 L. 218.]

Practice—Payment into Court after Decree—Admission—Evidence.

After a decree to take the accounts of a partnership the Chief Clerk directed that two accountants, one of whom was employed by the plaintiff and the other by the defendant in investigating the accounts for the purposes of the suit, should report on the accounts, showing what items were undisputed and what were disputed, and verify their report by affidavit. The accountants verified an account showing £541 due from the defendant to the plaintiff on the undisputed items, and verified also an account of disputed items. These were items of charge against the defendant, so that, however they were decided upon, the £541 would not be reduced:

Held, that the £541 ought to be ordered into court; for that, although no certifi-85] cate had been made, the fact that £541 at least was due from the \*defendant was ascertained with sufficient certainty to entitle the plaintiff to have it ordered

into court:

Held, also, that under the circumstances of the present case the defendant must be taken to have admitted by his agent that at least £541 would be found due from him.

The principles on which the court acts in ordering payment into court after a decree for an account, considered

THE plaintiffs, who were a limited company, and the defendants, Lord and Miller, had carried on in partnership an agency for the sale of articles made by a company in the west of England. Lord was the acting partner, kept the books, and received the moneys. The plaintiffs, being dissatisfied with his accounts, commenced an action in 1876 to have the partnership dissolved and the accounts taken. the 23d of November, 1876, upon motion for a receiver and injunction, which by consent was treated as a motion for judgment, the defendant Miller undertaking to pay the plaintiffs any balance which might be found due to them from Lord on taking the accounts, and in the meantime to give personal security for such balance, the partnership was declared dissolved as from the commencement of the action; accounts were directed of the partnership property and the partnership transactions; the usual directions for the appointment of a receiver were given; and further consideration was adjourned.

The accounts being very complicated, each party employed an accountant, and ultimately the Chief Clerk referred the accounts to the two accountants, directing them to make out a balance-sheet as regarded the undisputed items, and to make out a list of disputed items, and to make an affi-

davit as to the result of their investigation.

The accountants made out and verified by affidavit a balance-sheet as far as regarded the items on which they were agreed, and showed a balance of £541 due to the plaintiffs They also made out and verified by affidavit a list of the items on which they were not agreed. All these items were sums with which the plaintiffs alleged that Lord ought to be charged in his accounts beyond what he had been charged with. The last item was one of £561 9s., an allowance for working expenses, retained by Lord. As to this the plaintiffs alleged that, according to the construction of the partnership contract, it was only payable out of profits. \*and that on the accounts it appeared that [86 there were no profits out of which it could be paid, and that, therefore, half that sum was payable to the plaintiffs. accountant employed by the defendant deposed that the balance of £541 was subject to a question as to the computa-The plaintiffs' accountant thereupon made tion of interest. an affidavit, which was not contradicted, and which will be found more particularly referred to in the judgments, showing that in no event could the calculation of interest alter the balance more than £4 16s. in favor of the defendant Lord. The plaintiffs moved before Vice-Chancellor Bacon for London Syndicate v. Lord.

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payment into court of £2,609 7s., an amount which the defendant admitted to be due from him subject to the recovery of an outstanding asset of about £4,000. The motion was refused with costs by Vice-Chancellor Bacon. The plaintiffs

appealed.

Horton Smith, Q.C., and Oswald, for the appellants: There is upon the accounts and affidavits sufficient proof that the £541 will be coming to the plaintiffs to entitle them to have it brought into court: Dunne v. English ('); Toulmin v. Copland (1). The court can enter into the question of the propriety of the item of £561 9s., and order payment into court: Domville v. Solly (1).

Welby King, for Miller. Locock Webb, Q.C., and Solomon, for Lord: We say that there is no admission of anything being due, no report finding that anything is due, and that the report of the accountants, even if it were binding—which, not having been adopted by the court, it is not—does not find a balance due. The report of the accountants is nothing but materials to inform the mind of the court. Dunne v. English is not a partnership case, and is inapplicable. Richardson v. Bank of England (') shows that an admission is requisite.

[JESSEL, M.R.: That was before decree.]

87 \*Horton Smith referred to Wright v. Lukes (\*) and

Mills v. Hanson (\*).

After decree a binding report or an ad-[JESSEL, M.R.: mission is not indispensable; it is enough if a sufficient case of probability is made out: Creak v. Capell('); Brown v.  $De^{-}Tastet(^{\bullet}).$ 

At all events, as to the moiety of the £561 9s., there is no such case as the court can act upon. It involves a question

Horton Smith was called upon to reply only as to the moiety of the £561 9s.: I do not rest the case as to this sum on admission, but contend that it is a case of simple calculation, such as the court will make.

JESSEL, M.R., after shortly referring to the facts, and ob-. serving that the form of the judgment for taking the accounts and the nature of the reference to the accountants showed that they were by arrangement between the parties, continued:

As regards the question of interest the accountant for the

- (1) Law Rep., 18 Eq., 524; 10 Eng. R.,
  - (9) 3 Y. & C. Ex., 643.
- (³) 2 Russ., 372.
- (4) 4 My. & Cr. 165

- (5) 13 Beav., 107.
- (6) 8 Ves., 68.
- <sup>1</sup>) 6 Madd., 114. (8) 4 Russ., 126.

plaintiffs has put in an unanswered affidavit, showing that the calculation of interest may be made in three ways, that if taken in the way most advantageous to the defendant Lord it will result in an alteration of £4 16s. in his favor, in the second mode to £2 odd in his favor, and in the third way in a sum payable to the plaintiffs. The question of interest, therefore, is too trifling to deserve consideration. This being so, we may consider that the accountants are entirely agreed in making out £541 due from the defendant Lord to the plain-The defendant does not allege error in this, he only alleges that there are disputed items, and that in some way or other the account may turn out more favorable to him. But on examination of the list of disputed items it appears that if the plaintiffs fail in their contention upon every one of them, the balance as found against Mr. Lord by the accountants cannot be diminished, and if the plaintiffs succeed

on any of those items it will be increased.

\*Under those circumstances, has it been sufficiently ascertained, is there a sufficient probability, that the account will result in a balance of £541 at least being found due from Mr. Lord to the plaintiffs to authorize the court to act upon that view? I think that this question should be answered in the affirmative. There is also a question whether, independently of that consideration, there has not been a sufficient admission by Mr. Lord to authorize the court to make him pay that amount into court. I think that question must be answered also in the affirmative. I will first consider the former point. According to the practice of the Court of Chancery, when it was sufficiently ascertained after decree, as Sir John Leach said in Creak v. Capell('), that a sum of money would be due on taking the accounts, the court had power—a discretionary power undoubtedly—to order that sum to be brought into court as security. That was the general rule. Then how was it to be sufficiently ascertained? Sir John Leach gave three instances in that case, but there may be many others. Sufficiency of ascertainment cannot be ascertained positively à priori, nor can it be limited à priori to any number of particular modes of proceeding, and we have a very strong instance of that in the case of Brown v. De Tastet('), to which I have already referred. No doubt the practice was well settled that a master's report confirmed, which, though subject, under very special circumstances, to be reviewed, could not be generally reviewed, was a sufficient ground for ordering payment into court, but when the case of Brown v. De Tastet came before Lord Eldon on exceptions he

made an order which, after allowing one exception, referred it back to the master to review the report. The report, therefore, was disapproved of instead of being approved of. Lord Eldon then having disapproved of the report, that is to say, of the final result of the accounts as taken by the master, yet was of opinion, on looking at the evidence—for, as he had got rid of the report, it was only to the evidence that he could look—that it was probable that the defendant would be found to owe more than £18,000. I think that in this case we have a great deal more than probability, but that was the result to which Lord Eldon came, and upon that view of the evidence he made an order for the defendant to 89] \*pay the £18,000 into court. After Lord Eldon had ceased to hold the Great Seal the matter came before Lord Lyndhurst, and a motion was made on the part of the defendant that the order might be discharged as being contrary to the established practice of the court, it being an order made upon an unconfirmed report. Now, what did Lord Lyndhurst do with it? Lord Lyndhurst refused the motion on the ground that Lord Eldon, though he could not confirm the report, was right in making the order upon being satisfied from the evidence that a larger balance would be found due from the defendant, and that an order so made was not irregular.

That case is, therefore, a very high authority to establish that without a confirmed report, but after accounts have been taken, the court may look at the result of the accounts, and, upon being satisfied that there is a probability amounting to reasonable certainty that not less than a certain amount will be found due from the defendants, may in its discretion direct the amount to be brought into court. the matter came on again before Lord Lyndhurst on rehearing of the exceptions upon the merits, and he stated that he was unable in the present stage of the case to arrive at any safe conclusion with respect to the probable result of the accounts according to the principle on which the master was now to proceed in taking them, and he therefore reversed so much of Lord Eldon's order as directed the money to be paid into court. On this occasion he adhered to the principle of his former decision, that it is within the power and discretion of the court to order an amount to be paid into court by one of the accounting parties from whom it is made clear, in the opinion of the court upon a review of the

evidence, that a larger amount will be found due.

That being so on principle, I should say that now, when we no longer have a delegated judge to take the accounts,

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but the judge himself who decides the case takes the account in chambers, with the assistance of the chief clerks, if the judge finds from the evidence brought before him that a certain amount, and probably much more, will be found due from the defendant, but that by reason of unavoidable delay in ascertaining how much will be due no certificate can be made, and no final decision as to the ultimate \*bal- [90] ance of the account arrived at, he has power to say, "I am satisfied now that this amount, at all events, has been sufficiently ascertained, and I will order the defendant to pay it into court as security." It appears to me that on principle there can be no objection to such an order. The very object of litigation is to secure the fruits of that litigation to the successful party, and nothing can more conduce to attaining that object than taking security from the person who must ultimately pay at least the amount for which security Therefore, whether we look at the principle on which all practice should be founded, or whether we look at the principle to be deduced from the reported cases, I think we must arrive at the conclusion that the court can in the fair exercise of its judicial discretion, order a sum to be paid into court when it has been sufficiently ascertained to be due on the taking of the accounts. I labor that point more than the second, because it is one which is of general, if not of universal, application as regards the taking of accounts under judgments or decrees.

Now I come to the second, which is the narrow view. has been held in the Court of Chancery for many years, that an admission by an accounting party of a sum being due is sufficient to ground an order upon him to pay the sum into There is not, as far as I know, any virtue in one f admission rather than in another. What the court mode of admission rather than in another. has to be satisfied of is that the defendant has admitted the amount to be due. At one time it was supposed that the admission must be in an answer, and no doubt that was the practice of the Court of Chancery before decree. next settled that it need not be in the answer, but that it might be in an affidavit brought in by the defendant or in an answer to a question which he could not help answering on an examination taken by direction of the master. Whether it was a compulsory statement on oath or a voluntary statement on oath was immaterial, because it need not be upon oath at all. A man may admit by his agent or solicitor that the sum is due; he may put in a formal admission to that effect without any oath whatever, or he may act in such a manner as to authorize a third person to admit for him.

25 Eng. Rep.

He may say, "I will admit that to be due which my accountant finds to be due. I will delegate to an accountant 91] for me \*and on my behalf the right of stating the account for me, and I will admit that that is correct." is no difficulty in doing that, and if the court ascertains he has done it, the court will act upon the admission. case it appears to me to be clear that that is the effect of what the defendant Lord has done. He appoints his accountant to meet the other accountant and to settle between them what items are undisputed and what are disputed, and that is adopted by the Chief Clerk at his request. that being so, what the accountant does binds him as being admittedly right. He cannot quarrel with it because it is done by his own accountant, and when we find they both agree, he cannot afterwards say that he is at liberty to dispute it for the purpose of payment into court. It is a sufficient admission, at all events, for that purpose. I do not say it is a final admission, because even if a man has admitted in his affidavit or upon examination that a sum is due, and afterwards discovers he has made a mistake, the court will, if he comes in due time, relieve him from the consequences of such mistake; but in the absence of something of that kind he is bound by the admission as long as it stands, and the court is authorized to act upon it. It seems to me there is an ample admission for this purpose in the present case, and even if I had not arrived at the conclusion I have arrived at on the first point, I should think the order was right on the second, and therefore I should make the order as to the £541.

As regards the other part of the case, although I have a very strong impression as to what will ultimately result on taking the accounts, I do not think it is within either of the principles to which I have adverted. I mean the claim for This is not found by the accountants to be undisputed, but it is one of the disputed items, consequently it cannot be within the admissions by the defendant. it appear to me to be ascertained in the sense which I have mentioned. It will probably turn out when the accounts come to be taken that there will be a loss, and it will probably turn out that on a proper construction of the articles the £560 deducted by the defendant for expenses is not allowable. But I do not think it is the meaning of this rule that we should go into questions either of ultimate results of accounts not yet taken at all, or that we should go into questions of \*construction of agreements, and questions of that kind, which seem to me more proper to be dis-

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cussed on some other occasion than on the occasion of payment into court under an application such as this. I do not think it will be safe for us to extend the principles I have mentioned to a greater extent than they have gone, and therefore I think the order should be confined to that which I may call an admitted balance, viz., the £541.

BAGGALLAY, L.J.: I am of the same opinion, and I have

very little to add.

As regards the question of the £280, I entirely assent to what has just been said by the Master of the Rolls. As regards, also, the other sum of £541, I agree that, if a judge who is winding up the affairs of a partnership is satisfied upon the accounts which have been taken before him that there must be at least a certain amount coming due from one of the accounting parties, it is within his jurisdiction to order that that sum shall be brought into court; but I do not think it necessary to rest my decision in this case upon that view of the matter. If it were necessary to do so, there is, to my mind, abundant evidence before us to show that at least the sum of £541 will be found due from Mr. Lord. I prefer, however, to rest my decision on the more general principle, that there has been an admission by Mr. Lord, in the course of taking the accounts subsequent to the de-

cree, that the amount is due from him.

Now it has been for years the practice of the court, and it cannot now be disputed, that not only can payment of money into court in a partnership suit be ordered on admissions contained in the answer before decree, but that after decree it can be ordered, either upon report or upon admissions made by the party in the course of the proceedings. Now, it appears impossible to suggest a difference between an admission made by a person himself that a certain sum is due from him, and a statement that it is due made by a person to whom he has referred it, to ascertain what is due. Here the two accountants, one representing the plaintiffs and the other representing the defendant, make their separate investigations, and differ in the result at which they The two reports are taken before the Chief Clerk in Chambers, the parties attending before him, and then and there an order is made, which, \*according to its terms, clearly must have been the result of an agreement between the parties that the two accountants should meet together and endeavor to agree upon an account, and that the account which they should so agree upon should be verified by an affidavit. Now, if the account is so taken and so verified. I cannot understand on what principle the accountLondon v. Syndicate.

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ing party should not be as much bound by the result of an account which has been taken according to his own agreement, as if he had himself made an admission that the sum appearing to be due by that account was actually due from But then it is said that no such report has been made in this case, for that the £541 was subject to a question as to interest. This, however, even in the view most favorable to the defendant, would not lessen the amount by £5, and I agree with what the Master of the Rolls has said, that we must regard it as one of those trifling matters which this court cannot take into account in dealing with the principle The defendant, inwhich applies on the present occasion. deed, says that he does not assent to that view of the case as to the interest, and that it is merely the statement of his opponent's accountant, but it is verified by affidavit, and if the defendant wished to dispute its accuracy, he ought to have asked for an opportunity to file an affidavit for the purpose of correcting it. He did not do so, and therefore I think we must assume the statement of the plaintiff's accountant, that the amount of interest in any view of the case will be under £5, to be correct.

THESIGER, L.J.: I am of opinion, also, that as regards the sum of £541 2s. 4d. this appeal should be allowed.

We are not asked to give any final decision between the parties as to whether the sums which are the subject of the appeal are or are not due, nor to make any order that either of these sums should be paid by one party to the other. If such questions were to arise, they would have to be dealt with upon different principles, and with reference to a variety of considerations which do not in any way arise upon the present appeal. All that we are asked to do in this case is to say that a certain sum of money which it is alleged has been sufficiently for this purpose ascertained 94] \*to be due from the one party to the other, shall be secured by being paid into court.

It has been urged upon the part of the respondent that the court has no power to make such an order, except in two cases, first, where there has been a report finding the particular sum to be due, and, secondly, where there has been an admission by the party that that sum is due. Now, supposing that contention were well founded. I should agree with what has fallen from the Master of the Rolls, viz., that there is in the present case sufficient evidence of such an admission. It is clear, and has not been disputed in argument, that the admission need not necessarily be the admission of the party himself, and that it need not be made in

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any particular form or shape. Here, there being disputed items of account between the parties, and there being accountants employed by each of those parties for the express purpose of investigating those accounts, it was thought reasonable by the parties—and their view was confirmed by the Chief Clerk—that the two accountants should meet and endeavor to eliminate what was not in dispute between the parties, and make a report in the nature of a special report by referees chosen by the parties, in order to show what, if anything, they could agree upon as being due. That being the nature of the reference, if one may use that expression, and I do not wish to be misunderstood in using it, because I rather agree with the argument that has been addressed to us, viz., that this would not be a case coming within the 42d section of the act of 1852; but, there being that special reference, we find in the affidavit made by the two referees a distinct admission of a sum of £541 2s. 4d. being due, subject only to a question in respect of interest to which reference is made in the accounts. Now, there is no suggestion that the affidavit of the plaintiff's accountant to the effect that £4 16s. 5d. is the whole, under any circumstances, which could be due in respect of interest, is incorrect, and that being so, it appears to me that there is a distinct admission of the party through his authorized agent or agents of a sum due.

But I wish to go further, for it is important that the principles upon which the courts of the Chancery Division act in cases like the present should be well settled and laid down; and, looking to \*the convenience of the jurisdiction which is exercised by that division as to payment of money into court, I must say, speaking for myself, that I should like to see that jurisdiction applied to the same extent in the Common Law Divisions instead of being limited, as it is at present limited in those divisions. It seems to me that this jurisdiction is founded upon wider principles than those which the respondents admit. In the first place I entirely agree with what has fallen from the Master of the Rolls as to the decision in Brown v. De Tastet (1). If that case had only reported the decision of Lord Eldon, it would show that he had most distinctly held that it was not confined to acting in those cases only where there had been an accepted report or an admission, but was entitled to deal with the evidence in the case. But when you look at the final decision, it is clear that Lord Lyndhurst was of opinion that he was in no way fettered by the fact that there was no ex-

isting master's report, but was entitled to deal with the case upon the evidence which had been given in it, and that the only question which, under such circumstances, the court had to deal with was whether the particular sum in respect of which the court was asked to exercise its jurisdiction had been sufficiently ascertained as being due from one party to the other. And I would add that, looking at the reason and at the convenience of the rule, even if there had been no decisions of Lord Eldon and of Lord Lyndhurst such as were given in Brown v. De Tastet, I should concur with what has fallen from the Master of the Rolls, as to our being fully entitled to hold that what was there decided ought now to be decided. Here it seems to me that even if we cannot put the case so high as to say that there is a distinct admission on the part of the defendant that this sum of £541 is due. at all events it has been sufficiently ascertained that it is due, and without giving any final decision as to whether upon the ultimate taking of the accounts any sum, or what sum, will be found to be due, at all events it is just and proper that we should order that that particular sum should be secured in court.

For these reasons I think that the order of the Vice-Chancellor was erroneous, and that the appeal should be allowed 96] to the \*extent of the £541; but as regards the sum of £280, which is the subject of the second claim of the plaintiff, that sum has neither been reported as due, nor been admitted to be due, nor do I think that it has been so sufficiently ascertained to be due as to justify us in exercising our jurisdiction respecting it.

Solicitors: Crook & Smith; L. Pass.

[8 Chancery Division, 96.] C.A., Feb. 28, 1878.

Ex parte Arrowsmith. In re Leveson.

Vicar of District Church-Mortgage of Pew Rents-Validity-18 Eliz. c. 20.

A mortgage of pew rents made by the vicar of a district church is void under the act 13 Eliz. c. 20.

Macdonald v. Irvine.

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# [8 Chancery Division, 101.]

V.C.H., Nov. 6, 1876. C.A., Nov. 26, 1877: Jan. 15, 1878.

### \*Macdonald v. Irvine.

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#### 126.7 [1874 M.

Will—Conversion—Enjoyment in Specie—Life Estate interposed by Codicil—Ademption—Gift of Life Interest in Life Policy—Keeping up Premiums—Bonus—Legacy, Specific or Demonstrative-Legacy, Specific or Residuary-Enumeration of Articles.

A testator being possessed, among other things, of Egyptian Nine per Cent. Bonds, and also of a leasehold house held for lives and a policy for £3,000 on one of the lives, gave several specific legacies, and, among others, specific legacies of several of his Egyptian Bonds to various legatees, and gave the leasehold house and the policy for £3,000 and all bonuses and additions thereto, to J. M., she paying the future premiums, and directed that if she should be married at his death, the house and policy should be settled on her and her children; and the testator gave the residue of his estate, including his household furniture, to A. L. After the date of his will the testator married, and by a codicil gave to his wife for her life all the income, dividends, and annual proceeds of his entire estate, and postponed the payment of all legacies and the distribu-tion of all estates vested in him till after her death, and subject thereto confirmed his will.

Between the dates of his will and of his codicil the testator sold his Egyptian Nine per Cent. Bonds, and with the proceeds of the sale and other moneys purchased other Egyptian Bonds called Khedive Bonds.

The holder of the £3,000 policy was entitled to a participation in the profits of \*the office, and had the option of taking the bonuses when declared either by [102] reduction of the premiums or augmentation of the capital insured:

Held, that the specific legacies of the Egyptian Bonds were adeemed, and that the

Khedive Bonds formed part of the residue:

That the household furniture was not specifically given, but formed part of the

That the bonuses declared by the insurance company must be added to the capital, and not taken in reduction of the premiums :

That the premiums were not payable out of the rents of the leasehold house, but must be raised as they became payable by mortgage of the policy.

Held, also (dissentiente Baggallay, L.J.), that the residuary estate must be converted according to the rule in Howe v. Earl of Dartmouth (1), and the income paid to the

wife during her life: A legacy of "£500 Egyptian Nine per Cent. Bonds" held not to be specific, though the testator had such bonds at the time.

The decision of Hall, V.C., varied,

This was a suit for the administration of the estate of Lieutenant-Colonel James Horsburgh Macdonald, and various questions arose on the effect of his will and codicil.

The will was dated the 18th of August, 1870, and thereby the testator, who was then a widower, after appointing the Rev. James Horsburgh, G. Thompson, and A. L. Irvine his executors, and directing that his debts and testamentary expenses should be paid, gave to the said James Horsburgh his five shares in the Agra Bank, his ten shares in the Falkland Island Company, and all his interest, being two-thirds, in the copyright of Horsburgh's Directory, together with

£1,500 of his Egyptian Nine per Cent. Bonds absolutely. And he gave all the plate and plated ware of which he might be possessed at the time of his decease to his nephew James Horsburgh Lane; and gave to his nephew Charles Clayton Lane "£500 Egyptian Nine per Cent. Bonds" for his life, and after his decease to be equally divided between his children. And after giving various small pecuniary legacies and reciting that he had, in the events which happened, an absolute power of appointment by will over the trust estate settled by his marriage settlement, and that such estate then consisted of certain houses in Broad Street, Bath, held upon lease renewable on lives, on mortgage of which part of the 103] trust estate was many years \*since advanced, and which mortgage was afterwards foreclosed by the trustees of the said settlement, a policy of £3,000 in the Legal and General Life Assurance Company on the life of Charles Hensley; a further policy on the life of the said Charles Hensley in the West of England Life Insurance Company for £250, a sum of £2,000 advanced to him out of the said trust estate on mortgage of his house at Herne Hill, onethird share of a sum of £1,833 consols subject to the life estate of his mother, and a sum of £300 New £3 per Cent. Annuities; the testator appointed as follows: "As to the said leasehold premises at Bath, or all such interest therein as may now be vested in the surviving trustee of the said settlement, or as I may be entitled to appoint, I give and appoint the same unto my niece Eliza Jane Lane; and I also give and appoint unto her the hereinbefore mentioned policy on the life of Charles Hensley for £3,000, with all bonuses and additions thereto, she paying the future payments in respect thereof. And I direct that if my said niece shall be single at my decease the said premiums and policy shall be transferred and vested in her absolutely for her own use and benefit; but in case she shall be married, then I direct that the same shall be settled upon her in such manner that she shall have a life estate in the income derivable therefrom inalienable by her, and which shall not be subject to her husband's debts; and that upon her decease her husband shall be entitled, if he survive, to a like life estate; and that upon the death of the survivor the trust estate shall be in trust for her children equally at twenty-one years of age, and in default of children who shall attain a vested interest, then that the trust estate shall be divisible between the persons who would have been her next of kin if she had died unmarried and intestate. And I give her in addition £500 of my said Egyptian Bonds upon the same conditions.

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And I direct my trustees and executors either to transfer the. same to her, or to see the same settled upon the trusts aforesaid, according as she shall be single or married at my de-The testator then appointed to his nephews Charles Henry Lane and Alfred Luther Lane, as tenants in common, his leasehold house at Herne Hill, and also the sum of £2,000 secured thereon, so that the said house might be discharged from the said mortgage. And he directed that the said sum of £300 New £3 \*per Cent. Annuities, and the said policy for £250 on the life of C. Hensley, and all the residue of the said settled property, should be treated as part of his residuary estate. He then disposed of his residuary estate in the following terms: "I give and appoint all the rest, residue and remainder of my estate and effects, real and personal, and of what nature or kind soever the same may be, and wherever situate, and including the residue of the trust funds and premises under the said settlement, and my carriage, and the furniture which shall be in my house at the time of my decease, unto my said executors and trustees, and the survivors and survivor of them, upon trust, after paying and making provision for all the legacies and bequests hereinbefore given out of my personal estate, to pay such net residue to my nephew Alfred Luther Lane for his own use and benefit absolutely."

After the date of his will, namely, in January, 1872, the testator intermarried with his second wife, the plaintiff, Charlotte Macdonald. Immediately after his marriage he executed a memorandum republishing his will, by which he gave a life interest in all his property to his wife, and subject thereto he confirmed his will. This memorandum was

attested by Alfred Luther Lane, one of the legatees.

On the 6th of May, 1872, the testator made a codicil to his

will in the following words:-

"Whereas since the date and execution of my will contained in the within five sheets of paper, I have intermarried with my present wife Charlotte, Now I desire to give to her, and I do hereby give and appoint to her for her life, all the income, dividends, and annual proceeds of my entire estate, and I postpone the payment of all legacies and the distribution of all estates vested in me, or over which I have any power of disposition or appointment, until after her decease. I give to my faithful servant, Lucy Spalding, an annuity of £30 per annum, to commence from the death of my said wife; and in all and other respects, but subject hereto, I revive and confirm my said will, and do hereby republish the same. And I do cancel the memorandum of republication written

25 Eng. Rep.

at the foot of the fifth sheet of my said will, my nephew Alfred Luther Lane having witnessed the same, and thereby being deprived of any interest under the said will."

105] \*The testator died ten days after the execution of his codicil, and the will and codicil were proved by the three executors named in the will.

The testator's niece, Eliza Jane Lane, in the month of

March, 1872, married G. Manson.

The leasehold house at Bath mentioned in the will was held for a term of 99 years, if John Hensley, since deceased, P. George, since deceased, and the Rev. Charles Hensley should so long live, at a rent of £1 3s. 3d. This house was conveyed on the 8th of September, 1840, to the trustees of the testator's marriage settlement, by way of mortgage for securing the repayment of £3,000 advanced by them out of the trust funds, and by the same indenture, the said two policies of £250, at an annual premium of £5 17s. 6d., and £3,000 at an annual premium of £98 13s., on the life of C. Hensley, were also assigned to the said trustees as further security for the said debt.

The trustees had been for more than twenty years in adverse possession of the mortgaged premises, and for the purposes of the suit the mortgage was treated as absolutely

foreclosed.

The holder of the policy of £3,000 on the life of C. Hensley was not originally entitled to participation in the profits of the Legal and General Life Assurance Society, but in the year 1847 it was exchanged by the trustees for a policy, with participation in the profits, at an annual premium of £10414s. The profits were divided every five years, and the assured were entitled to receive their share in the profits either by reduction of the premiums payable for the next five years, or by an addition to the amount insured by way of bonus. At the division of profits which took place in 1867 the testator, who was treated as the absolute owner of the policy, elected to take his share by way of reduction in the annual premium, by which the premium for the following five years was reduced to £75. But at the quinquennial division of profits, which took place in July, 1872, soon after the testator's death, the executors declared no election to take a reduction of the premium, and paid the original premium of £104 15s. until the filing of the bill.

The testator at the date of his will was possessed of £2,900 Egyptian Nine per Cent. Bonds, issued in 1867; but in the 106] month \*of February, 1872, he sold these bonds, and with the proceeds of the sale and other moneys he purchased

Egyptian Seven per Cent. Khedive Bonds, issued in 1870, of which he was possessed at the time of making his codicil and of his death. The Nine per Cent. Egyptian Bonds of 1867 were issued by the Egyptian Government for the purpose of purchasing the property of Mustapha Pasha, and the principal and interest were guaranteed by the Egyptian Government. The Seven per Cent. Khedive Bonds of 1870 were issued to meet the expense of bringing into cultivation the sugar estates of the Khedive, and were secured upon the private estates of the Khedive. Both securities were quoted as Egyptian Bonds in the Stock Exchange list.

The cause came on for hearing on further consideration before Vice-Chancellor Hall on the 6th of November, 1876, when several questions were brought before the court, the

principal of which were as follows:-

1. Whether the property comprised in the will ought to be enjoyed in specie by the plaintiff, the testator's widow, or ought to be converted by the executors and the income of the proceeds paid to the plaintiff during her life.

2. Whether the testator's carriage and household furni-

ture were specifically bequeathed.

3. Whether the premiums of the policy for £3,000 ought to be paid out of the rents of the leasehold property at Bath, or out of what other fund.

4. Whether the profits at the periods of division should be added by way of bonus to the policy money, or taken by way of reduction of the premiums.

5. In what way the policy for £250 on the life of C. Hens-

lev should be dealt with.

6. Whether the Khedive Bonds passed under the gift of the Egyptian Bonds, or whether the gift of the Egyptian Bonds had been adeemed.

7. Whether the bequest of £500 Egyptian Nine per Cent. Bonds to Charles Clayton Lane was a general or a specific

legacy.

Dickinson, Q.C., and Jason Smith, for the plaintiff: On the question of conversion they cited Bothamley v. Sherson (1); \*Alcock v. Sloper (1); Collins v. Collins (1); [107] Bethune v. Kennedy (1).

Hastings, Q.C., and H. Cadman Jones, for Alfred Luther

Lane, the residuary legatee.

Eddis, Q.C., and Ware, for Eliza Jane Manson, her husband and children, and C. H. Lane.

(2) 2 My. & K., 699.

<sup>(1)</sup> Law Rep., 20 Eq., 304; 13 Eng. R., (5) 2 My. & K., 703. 814. (4) 1 My. & Cr., 114.

Dibdin, for Charles Clayton Lane.

HALL, V.C., on the first and second points, was of opinion that the leaseholds and other property specifically given by the will ought to be enjoyed specifically by the plaintiff, but that the property comprised in the residuary gift must be converted, and the income of the proceeds paid to the plaintiff during her life; and that the carriage and furniture were not specifically bequeathed, but were included in the general residue. On the third question his Lordship continued:

I am of opinion, upon the true construction of the will, that the leasehold property is charged with the payment of the premiums. Two properties are given to Eliza Jane Lane, one being a leasehold property held for a life, and the other a policy effected on that life, and the two properties are given to her, she making the future payments in respect If she is single at the death of the testator, she is to have the property out and out. If not, the property is to be settled. I take it that these words as to the making future payments in respect thereof amount to a charge, trust, or obligation affecting the property to make that payment; and supposing she had not been single at the time of the death of the testator, her children would have had a right to say as against her, "We will have the income of the leasehold property which you take applied, in so far as it is necessary, for the purpose of making the payments." the proper way of putting it, and it never could have been meant that this was a mere personal obligation, and that although in one event she would have only a life interest in it, if she died her personal estate would be liable to continue \*the payment for the benefit of her children, who would in that event be entitled to the property. If upon the whole instrument it is to be collected that the property was intended to be taken subject to the obligation, a trust or charge will be created; as to this I refer to the case of Wright v. Wilkin ('). I therefore think that the premiums must be paid out of the income of the leaseholds.

With respect to the fourth question, as to the bonuses, his Lordship said: It appears to me that what has been done by the trustees is right, and that the same course ought to be pursued in future; that is, the bonuses should be added to the policy money. If there should not be enough income of the leasehold property to pay the premiums, the deficiency must be raised out of the corpus of the leaseholds, or of the policy, or both; the deficiency must not be thrown

on the general estate.

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With respect to the fifth question, as to the policy of £250, his Lordship held that that was part of the residue, and must be sold or surrendered.

On the sixth and seventh points his Lordship said: It appears to me that the legacies of the testator's Egyptian stock are adeemed and not recreated by the codicil. The main object of the codicil, no doubt, was to give that effect to the will which the will would have had but for the fact of the testator's marriage, which revoked the will. argument addressed to me is this: that the testator gives a certain thing by his will, having at that time that thing to give, and having afterwards disposed of that thing, and acquired something else which might, if he had had it at the date of his will, and had not then had the actual thing given, have been sufficient to answer and pass by the description in the will; that the effect of the codicil, by which he confirms and republishes the will, is to give something different from that which was effectually given by the will, and would have passed by it but for the fact that the testator disposed of it. I do not follow that reasoning. Where he confirms the will you must repeat it only in this sense, that you re-peat the disposition in the will, giving the thing which he gave by the will and not a different thing. I cannot make the codicil pass a different thing \*from that which [109 was effectually disposed of by the will and would have passed by it.

With respect to the legacy of £500 Egyptian Nine per Cent. Bonds to C. C. Lane and his children, that is a general legacy. As everything is given to the widow for her life, the legatee must apply on her death for the value of the

legacy, which must be ascertained at that time.

From this decision, so far as regarded the declarations that the furniture and carriage formed part of the residuary estate, and that the residuary estate, including the Khedive Bonds, should be converted and the income of the proceeds paid the plaintiff during her life, and that the premiums on the policy for £3,000 should be paid out of the income of the leasehold property at Bath, and that the bonuses should be added to the premiums, the plaintiff appealed. The appeal came on for hearing on the 26th of November, 1877.

Dickinson, Q.C., and Jason Smith, for the appellant: It is admitted by the respondents that the leaseholds and other parts of the testator's property specifically given by the will must be enjoyed by the widow in specie, in order that they may be preserved for the persons entitled in remainder.

But the same reason applies to residuary estate, for it was clearly the intention of the testator, in framing the codicil. that everything he had should be kept in statu quo during his wife's life, and no distribution or conversion take place till her death. He gives the income of his "entire" estate to his wife, and "postpones the payment of all legacies and distribution of all estates" till after her death. In those words there is quite sufficient intention shown to take the case out of the operation of the rule in Howe v. Earl of Dartmouth ('), Pickering v. Pickering ('), Alcock v. Sloper ('), Collins v. Collins ('), Simpson v. Lester ('), Thursby v. Thursby (\*), Harris v. Poyner ('), Holgate v. Jennings (\*). In any case the carriage and household furni-110] ture are specifically given, and not included in \*the residue, and they ought to be enjoyed in specie: Vaughan v. Buck (\*); Bethune v. Kennedy (\*\*).

With respect to the policy of £3,000, we contend that there is no ground for charging the premiums on the rents of the leasehold estate at Bath, as the Vice-Chancellor has ordered. If the policy alone had been given to the wife for life, and after her death to another person, the court would never have thought of obliging the tenant for life to keep down the premiums for the benefit of the remainderman. result would be that the tenant for life might have to bear all the burden, and the remainderman might reap all the benefit. At the date of the will there was no connection between the leaseholds and the policy, and the testator has not shown an intention to connect them in such a way as to make one a charge upon the other. We also say that the share of profits ought to be taken in reduction of the pre-That was the way in which the testator elected to take it during his life, and the court ought to presume that this was his intention in the administration of his property.

Hastings, Q.C., and H. Cadman Jones, for the residuary This case must come within the principle of Howe v. Earl of Dartmouth ("), unless a clear intention can be shown that the residuary estate shall be enjoyed in specie. There is no such intention here. The mere fact that the payment of the residuary legatees is postponed till the death of the tenant for life is not sufficient: Blann v. Bell ("). is the direction by the testator that the "distribution" of

<sup>(</sup>¹) 7 Ves., 137. (2) 4 My. & Cr., 289. (3) 2 My. & K., 699. (4) Ibid., 703.

b) 4 Jur. (N.S.), 1269.

<sup>(6)</sup> Law Rep., 19 Eq., 395.

<sup>(1) 1</sup> Drew., 174.

<sup>(8) 24</sup> Beav., 623. (°) 1 Ph., 75. (°) 1 My. & Cr., 114. (°) 7 Ves., 187.

<sup>(19) 2</sup> D. M. & G., 775.

this estate should be postponed. That word does not imply conversion, and he merely directed what the law would have done without such direction. With respect to the carriage and furniture, the gift is not made specific merely by enumerating them, In re Tootal's Estate ('); and although if there had been a life estate given by the will the mention of them in the gift over might have been material, the creation of a life estate by a codicil cannot give any operation to words which were merely surplusage when they were used.

\*Eddis, Q.C., and Ware, for Mrs. Manson and her [11]

husband and children: The policy for £3,000 was originally connected with the leasehold estate, being a policy on one of the lives on which the estate was held, and included with it in the mortgage security. The testator has shown an intention that it should be still so included, for he has given them to the same persons, and has directed them both to be settled as one property on Mrs. Manson and her children. The court ought, therefore, to give effect to that intention: Darcy v. Croft (\*). In the will the testator gave the policy to Mrs. Manson, "she paying the future payments in respect thereof." That constituted a charge upon the estate which was given with it: Wright v. Wilkin (4). And when by the codicil he interposed the plaintiff as the first tenant for life, he meant her to take each part of his property in the same manner as the original legatees would have taken If the tenant for life were now dead the court would oblige the trustees to keep up the policy for the benefit of Mrs. Manson and her children out of the trust estates. With respect to the bonuses, they are expressly given with the policy; and the fact that the testator during his life elected to have the premiums reduced can make no difference in the future bonuses in the face of so clear a declaration of his intention.

Dickinson, in reply.

1878. Jan. 15. BAGGALLAY, L.J.: Two questions are involved in this appeal, the one whether, according to the true construction of the will and codicil of Colonel Macdonald, there is sufficient evidence of his intention that his wife should enjoy the income of his residuary personal estate in specie to exclude the operation of the rule commonly spoken of as the rule in *Howe* v. *Earl of Dartmouth* (\*); the other, in what manner provision should be made for the payment of the premiums upon a certain life policy bequeathed by

<sup>(1) 2</sup> Ch. D., 628; 17 Eng. R., 650.

<sup>(2) 9</sup> Ir. Ch. Rep., 19.

<sup>(\*) 9</sup> W. R., 161.

<sup>(4) 7</sup> Ves., 137.

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112] the testator in the \*manner to be presently mentioned. Upon the first of these questions I have the misfortune to differ in opinion from the other members of the

court; upon the second I believe that we are agreed.

As regards the first question, the rule as laid down by Lord Eldon in Howe v. Earl of Dartmouth ('), and as explained by subsequent decisions, and particularly by Lord Cottenham in Pickering v. Pickering ('), amounts to this, that where there is a residuary bequest of personal estate to be enjoyed by several persons in succession, a court of equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving effect to such intention, will direct the conversion into permanent investments of a recognized character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognized character and are consequently deemed to be more or less hazardous.

But it must be borne in mind that the rule when acted upon is based upon an implied or presumed intention of the testator, and not upon any intention actually expressed by him, and courts of equity have consequently always declined to apply the rule in cases in which the testator has indicated an intention that the property should be enjoyed in specie, though he may not in a technical sense have

specifically bequeathed it.

The real question, therefore, in all cases similar to that under consideration, is, whether the testator has with sufficient distinctness indicated his intention that the property should be enjoyed by his wife in specie. A great number of authorities have been cited in the course of the argument before us for the purpose of illustrating the principles upon which courts of equity have from time to time acted in deciding whether expressions or indications of intention, more or less distinct, have or have not been sufficient to exclude These authorities, for the most the adoption of the rule. part, turn upon the special circumstances of the particular cases under consideration, but they nevertheless, upon the whole, show an inclination on the part of \*successive judges to allow small indications of intention to prevent the application of the general rule. This view was very forcibly expressed by Vice-Chancellor Wigram in the course of his judgment in the case of Hinves v. Hinves (1), in which he carefully reviewed the previous decisions, including the

<sup>(1) 7</sup> Ves. 137.

<sup>(2) 4</sup> My. & Cr., 289.

<sup>(8) 3</sup> Hare, 609, 611.

greater part of those to which our attention has been di-His words were, "The court in applying the rule has leant against conversion as strongly as is consistent with the supposition that the rule itself is well founded." similar view was expressed by the late Master of the Rolls in the case of *Morgan* v. *Morgan* (1). Nor is it, in my opinion, a matter of surprise that judges should have entertained and acted upon such views, when we call to mind the circumstances of the case in which the rule was enunciated by Lord Eldon, and of those to which it has been subsequently The rule so enunciated had been for many years applied. a well recognized rule of the Court of Chancery; it was in no way questioned in the case of Howe v. Earl of Dartmouth (1), in which the only question was whether it was applicable to the will then under consideration. The words of the will were very simple and concise; the testator left all his personal and landed estates to his eldest sister, Lady Anne Conolly, for her life, and then to the eldest son of George Byng, Esq., and the question was whether the combination of the personal and landed estates—the devise of the latter being necessarily specific—imposed upon the personal estate such a quasi specific character as to exclude the operation of the rule; and Lord Eldon held that it did In Howe v. Earl of Dartmouth the property bequeathed was but once described; the same thing was to be enjoyed by the tenant for life and by the reversioner, and by conversion alone could this be effected. If the application of the rule had been confined to cases as simple as Howe v. Earl of Dartmouth, the propriety of so applying it could hardly have been questioned, and one cannot but feel that by its extension the wishes and intentions of testators have been frequently defeated. But the rule is too well established to be departed from by this court, and the sole question we have to decide is, how are we to apply it to the case now under consideration?

\*The circumstances of the case are as follows: [114 Colonel Macdonald made his will on the 18th of August, 1870; he was then a widower and without children; he was not possessed of any real estate, but his personal estate comprised, inter alia, Egyptian Nine per Cent. Bonds to the nominal amount of £2,900, certain shares in the Agra Bank and in the Falkland Islands Company, an interest in the copyright of Horsburgh's Directory, and a leasehold house and premises at Herne Hill, where he resided; he also had an absolute power of appointment by will over the estate

<sup>(1) 14</sup> Beav., 72. 25 Eng. Rep.

which was the subject of the trusts of his marriage settlement, and which trust estate then comprised, *inter alia*, a leasehold house at Bath held for a term of years determinable on the death of the Rev. Charles Hensley, a policy on the life of the said Charles Hensley for the sum of £3,000, and a sum of £2,000 secured by a mortgage of his own prop-

erty at Herne Hill.

The scope of this will was as follows: The testator first directed the payment of his debts and funeral and testamentary expenses; he then gave several pecuniary legacies to the amount in the whole of between £400 and £500, and made specific bequests of his plate, books, and wearing apparel, and also of all the above enumerated articles, with the exception of the Egyptian Bonds; of these he made specific bequests to the nominal amount of £2,400, and probably intended to specifically bequeath the remaining £500, but failed to use language sufficient to effect that purpose. He then bequeathed the residue of his estate in the following terms: [His Lordship read the residuary gift set out above, and continued:]

In the month of January, 1872, the testator intermarried with the plaintiff. He appears to have been aware that his will was revoked by his marriage, for he shortly afterwards executed a memorandum of republication, by which he gave a life interest in all his property to the plaintiff, and subject

thereto confirmed his will.

About the end of February or the beginning of March, 1872, the testator sold his £2,900 Egyptian Nine per Cent. Bonds, and with the produce of such sale and other moneys purchased £4,000 Egyptian Seven per Cent. Bonds, which are referred to as "Khedive Bonds" in the decree from 115] which this appeal is brought; by \*reason of such sale and purchase the specific legacies, amounting to £2,400 of the Nine per Cent. Bonds, were adeemed, and the property comprised in the residue was increased by the £4,000 Khedive Bonds.

On the 6th of May, 1872, the day before his death, he made a codicil to his will in the following terms: [His Lordship

read the codicil.

On the 7th of May, 1872, the testator died. With the exception of the sale of the Nine per Cent. Bonds and the purchase of the Seven per Cent. Bonds, his personal estate was substantially in the same state of investment at the time of his decease as it had been at the date of the will.

It further appears that the property specifically mentioned in the will constituted the greater part, if not sub-

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stantially the whole, of the property vested in himself, or over which he had absolute power of disposal by his will; the property which became subject to the residuary clause comprised, in addition to the furniture and the Khedive Bonds, a further policy for £250 on the life of the Rev. Charles Hensley, the third part of a sum of £1,833 6s. 8d. consols, subject to the life estate therein of his mother, and a sum of £300 10s. 10d. New Three per Cents, all of which several properties formed part of the estate subject to the trusts of his marriage settlement.

On the 19th of June, 1874, the plaintiff filed her bill in the suit, and claimed to be entitled to the income, dividends, and annual proceeds of the testator's entire personal estate, as it was invested at the time of his decease. This claim, so far as the £4,000 Khedive Bonds and the furniture were concerned, was opposed by the residuary legatee, who insisted that the rule in *Howe* v. *Earl of Dartmouth* (') ought to be applied. The Vice-Chancellor was of this opinion, and so held, and from his decision the present appeal

is brought.

Now, if we first turn to the codicil, we find the testator referring to his marriage since the date of his will. and giving to his wife for her life all the income, dividends, and annual proceeds of his entire estate. If this had been followed by a simple gift in the same general terms of his entire estate to any person or number \*of persons, to [116] take effect upon the decease of his wife, there could be no doubt as to the rule in Howe v. Earl of Dartmouth (') being applicable; but we do not find the gift which is to take effect on the decease of his wife in so simple a form. testator first postpones the payment of all legacies and the distribution of all estates vested in him, or over which he has any power of disposition or appointment, until after his wife's decease, and then, after giving an annuity to a servant to commence from the death of his wife, he revives, and confirms, and republishes his will, subject to the dispositions made by the codicil; in other words, all that he has by his will directed to be done on his own decease is to be postponed until after the plaintiff's decease, and is then to be carried into effect. What, then, did he direct by his will to be done on his own decease, and how are these directions affected by the codicil? The direction in the will for the payment of his debts and funeral and testamentary expenses was unnecessary; it was what the law would require his

executors to do without any such direction, and they were equally bound to discharge this duty, notwithstanding the interposition of the life estate. Again, it is quite clear, and it has been so decided by the Vice-Chancellor, that all the property specifically bequeathed by the will, with the exception of the Egyptian Bonds, the legacies of which were adeemed, is to be retained in specie during the life of the plaintiff, and that she is entitled to receive the income of it as so retained. We come, then, to the residuary gift, and by it the residue, of whatever it may consist, is given upon trust for conversion, the trust of the proceeds of such conversion being, as expressed, that after paying and making provision for all the legacies and bequests before given, the net residue is to be paid to the residuary legatee, but the conversion is only directed for the purpose of paying or otherwise providing for the legacies, and until such legacies are to be paid or provided for, there is no necessity for such conversion, nor can the trust arise. The realizing by the trustees of the gift of the reversion appears to me to be as much a distribution of the testator's estate as the payment of any pecuniary or the delivery over of any specific legacy; and all of these dealings with the estate are, by the operation of the codicil, to be postponed \*until after the death of the plaintiff. Taking, then, the will and codicil as one disposition, they amount to this, that the testator gives to his wife all the income, dividends, and annual proceeds of his entire estate during her life, and directs that after her death the following distribution of his estate (that is, of the same entire estate) shall be made, namely, certain portions of it are to be paid or dealt with in accordance with the pecuniary and specific bequests mentioned in the will, and the residue is to be converted for the purpose of providing for such payment and dealing, and the net proceeds of the conversion, after satisfying such purpose, are to be paid over to the residuary legatee.

If it be the true construction of the will and codicil, and I think it is, that the conversion of the residue is by the codicil postponed until after the death of the plaintiff, the intention of the testator would be defeated by directing it to take place at an earlier period, and the rule in *Howe* v. Earl of Dartmouth (') ought not to be applied. If authority were necessary to support this proposition it is entirely borne out by the decisions in Collins v. Collins (2) which was approved of by Lord Cottenham in Pickering v. Pick-

(1) 7 Ves., 187.

(9) 2 My. & K., 703.

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ering ('); Bethune v. Kennedy ('); Daniel v. Warren ('); Rowe v. Rowe (').

I am of opinion, therefore, that the rule in Howe v. Earl of Dartmouth is not applicable to the present case, and that the widow is entitled to the income of the testator's estate in the state of investment in which it was at the time of his decease.

Having arrived at this conclusion upon the general construction of the will and codicil, it is unnecessary to express any decided opinion upon the argument addressed to us by the counsel for the appellant on the use of the word "entire" in the gift to the plaintiff; but having regard to the nature of the property at the disposal of the testator, and to the disposition of it made by him by his will, and to the circumstance that his marriage was the assigned reason for the disposition made by the codicil, I am disposed to think that the testator in giving to the plaintiff the income, dividends, and annual proceeds of his "entire" estate meant by \*the use of the word "entire" to indicate that she [118 was to have the income derived from the property as it should exist at his death; such a construction would be in accordance with the strict meaning of the word.

I think, also, that the general circumstances to which I have just alluded are strongly suggestive that the view which I have taken of the construction of the testator's will and codicil are in accordance with his real intention, though the expression of my opinion has not been based on these con-And here I may mention that if according to the true construction of the testator's will and codicil his widow is not entitled to enjoy the property comprised in the residuary gift in specie, this somewhat singular consequence will ensue, that whilst she is entitled to the use and occupation of the testator's residence during her life in accordance with his expressed intention, he is to be presumed to have intended that the furniture in the house in which he and she were residing at the date of his codicil, and in which he must have contemplated their residing until his decease, should be sold immediately after that event occurred. mention of the furniture in the residuary gift would not of itself be sufficient to confer upon the gift a specific character, as was held in In re Tootal's Estate (\*), but when taken in connection with the specific gift of the house in which it

<sup>(1) 4</sup> My. & Cr., 289. (\*) 1 My. ds Cr., 114. (\*) 2 Y. ds C. Ch., 290.

<sup>4) 29</sup> Beav., 276.

<sup>(5) 2</sup> Ch. D., 628; 17 Eng. R., 650.

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was contained, it becomes an element for consideration not wholly unimportant in the view which I take of the case.

I pass on to the second question involved; it arises in the following way: The testator by his will gave and appointed the leasehold premises at Bath and the policy for £3,000 upon the life of the Rev. Charles Hensley, both of which, as before stated, formed part of the estate subject to the trusts of his marriage settlement, to his niece the defendant Eliza Jane Manson, then Eliza Jane Lane, spinster, and he directed that if she should be single at his decease the said leasehold premises and policy should be transferred to and vested in her absolutely for her own use and benefit, but that in case she should be married the said premises and policy should be settled upon her and her husband and children in succession, and he directed his trustees and ex-119] ecutors to \*transfer the same to her, or to see the same so settled according as his said niece might be single or married at his decease.

The policy in question had been effected with the Legal and General Life Assurance Society in the month of July, 1847, at an annual premium of £104 15s., and it entitled the assured to a participation in the profits of the society. appears to have been and to be the custom of the society to divide their profits every five years, and to give the assured the option of receiving their share of profits, either by a reduction of the premiums during the next period of five years, or by an addition to the amount insured by the policy by way of bonus. A quinquennial division of profits took place shortly before the testator's death, and notice was given to the testator by the society that if he wished to exercise his option of having the premiums reduced instead of having the bonus added, he must give notice to that effect to the Neither the testator nor the executors gave any such notice, though on the occasions of previous divisions of profits the testator had taken his share of profits in the form of a reduction of premiums, and accordingly when the next payment of premiums became due, in July, 1872, the full premium of £104 15s. became payable in accordance with the rules of the society, and was paid, and a bonus was added to the sum assured; a similar premium had been paid in each succeeding year.

The plaintiff, by her bill, stated that the premiums so paid since the testator's death had been paid out of the income of his estate, and she submitted that they ought not to have been paid out of any income to which she was entitled for life, or that at any rate the profits should be taken

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by way of reduction of premiums and not by way of additions to the sums assured. On the part of the defendants it was contended, and the Vice-Chancellor held, that the premiums on the policy for £3,000 in the Legal and General Life Assurance Society ought to be continued to be paid at the full rate (bonuses being added to the policy money), and that the clear rents of the leaseholds at Bath after payment of repairs, fire insurance, and other outgoings, were applicable to the payment so far as they would extend of such premiums, and that the premiums, so far as such rent was insufficient, were a charge on the policy money and bonuses, and that the ultimate surplus \*(if any) of such [120 rents was payable to the plaintiff during her life, and that any deficiency was to be raised in such manner as the judge in chambers should direct.

Now, it is to be observed that the bequest in the testator's will is of the policy with all bonuses and additions thereto, the legatee paying the future premiums in respect thereof; and upon these words I am disposed to think that, by whomsoever or out of whatever source the premiums are to be paid, the full amount should be paid, so that the share of profits should in all cases be added by way of bonus to the capital sum assured; but even if the words were not sufficient to make such construction beyond doubt, it appears to me that the executors were not only not called upon, but were not authorized, to exercise any option in the mat-To this extent I agree with the Vice-Chancellor, put I am unable to concur with him in thinking that the amount of the premiums were from time to time payable out of the net rents of the leasehold premises, or in any other way by the plaintiff. I am unable to find any such direction in the will, nor anything from which any such direction could be It may be held that in preparing a proper settlement of the leasehold premises and policy pursuant to the directions in the will, provision would be made for keeping the policy on foot for the benefit of the beneficiaries under the settlement; but these directions of the testator are only to be carried out after the death of the plaintiff. If the testator had so directed it, his directions must have been attended to, but in the absence of any such directions it would hardly be equitable to compel the plaintiff to keep on foot a policy for the benefit of other persons. The policy however ought to be kept on foot, and as this is a suit for general administration, it can probably be arranged that the premiums shall be raised by way of charge upon the policy, so that those who will eventually become entitled to the benefit Macdonald v. Irvine.

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of the policy will bear the burden to the extent of their re-

spective interests. THESIGER, L.J.: The main question in this suit is whether, upon the true construction of the will and codicil set out in this bill of complaint, the widow of the testator is entitled to enjoy for her life, in specie, the residuary estate bequeathed by the will, or whether such residuary estate is subject to the rule laid down in Howe v. Earl of Dartmouth ('), Pickering v. Pickering ('), and other cases, and The Vice-Chancellor has decided in must be converted. favor of conversion, and I am of opinion that he has rightly so decided. The rule itself is a simple one, founded upon the presumption, that where personal estate is given in terms amounting to a general residuary bequest, to be enjoyed by persons in succession, such persons are to enjoy the same thing in succession, and effectuating the presumed intention of the testator by the conversion into investments approved by the court of so much of the personalty as is at the death of the testator of a wasting, or perishable, or insecure nature, and also of reversionary interests. It has been said that the leaning of the judges of the Court of Chancery in the more modern cases has been against rather than in favor of the application of the rule, and no doubt Vice-Chancellor Wigram, in the case of Hinnes v. Hinnes ('), takes that view, while the late Master of the Rolls, in Morgan v. Morgan ('), says that "the effect of the latter cases has been to allow small indications of intention to prevent the application of the rule;" but on the other hand Lord Romilly, when in the latter case he is dealing with the contention that the burden of proof does not lie more upon those who oppose than those who support the application of the rule, and that, being a question of construction, it is for the court to look into the will and discover the testator's real meaning, uses the following words in the same page: "In one sense this is certainly true, but still in my opinion the rule of law is, that unless there can be gathered from the will some expression of intention that the property is to be enjoyed in specie, the rule in Howe v. Earl of Dartmouth is to prevail. It is therefore incumbent on the persons contesting the application of that rule, and on the court which forbids that application, to point out the words in the will which exclude it, and if this cannot be done the rule must apply." Adopting, then, the words of Lord Romilly, I come to the consideration whether there can be gathered from the will and codicil

<sup>(1) 7</sup> Ves., 187.

<sup>(2) 4</sup> My. & Cr., 289.

<sup>(3) 3</sup> Hare, 611.

<sup>(4) 14</sup> Beav., 72, 82.

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in the present case any expression of intention that the property in question is to be enjoyed in specie. \*In almost 122all, if not all, the cases which have been cited in argument, where such an intention was found to exist, with the exception of Bethune v. Kennedy (') (which has gone almost to the extreme length consistent with the existence of the rule at all), we find either words in their natural and literal sense importing use or enjoyment of the property in the state in which the testator left it at his death, or directions contained in the will as to the conversion of the property which were inconsistent with a conversion by the court taking place upon the death of the testator. In the present case I find neither of those elements existing. In the first place, by the codicil the testator does not, as in Pickering v. Pickering (\*), give to his wife "the interests, rents, dividends, annual produce, and profits, use and enjoyment of all my estate and effects whatsoever, real and personal," nor does he give her "all and every part of my property, in every shape and without any reserve, in whatever manner it is situated," which were the words of the will in Collins v. Collins ('), but he gives and appoints to her "all the income, dividends, and annual proceeds of my entire estate"—words which are quite consistent with the residuary estate bequeathed by the will being put into a state of investment which would secure the succession to it of the persons named as beneficiaries. the second place, I do not find in the codicil any provision such as that contained in the will in Alcock v. Sloper ('), where the testator devised and bequeathed all the residue of his real and personal property to his executors upon trust to permit his wife to receive the rents, profits, dividends, and annual proceeds thereof to and for her own sole use and benefit during her life, and upon her decease upon trust to sell his freehold and leasehold houses, followed by an expression of his desire that a certain named person should be employed as auctioneer, to convert the whole of his estate and effects into money, and to distribute the same in equal shares and proportions in the manner mentioned in his will. Again, I do not find any words such as those used in Harris v. Poyner (\*), where the testator, after giving to his wife an estate for life in residuary real and personal estate, in words \*which in themselves rather indicated an intention [123] that the property should remain in specie, gave the property after her death to his sons, with directions as to the transfer

<sup>(1) 1</sup> My. & Cr., 114.

<sup>(\*) 4</sup> My. & Cr., 289. (\*) 2 My. & K., 703.

<sup>25</sup> Eng Rep.

<sup>(4) 2</sup> My. & K., 699.

<sup>(5) 1</sup> Drew., 174.

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by the executors to him of such property, in terms some of which would have been altogether inappropriate unless applied to the transfer in specie of the leasehold property which the testator possessed and which the Vice-Chancellor held need not be converted. In the codicil in the present case the testator, no doubt, follows the gifts to his wife by the words "postpone the payment of all legacies and the distribution of all estates vested in me or over which I have any power of disposition or appointment until after her decease, but the expressions "payment of all legacies" and "distribution of all estates" seem to me to have for their intuitus not any question as to the management of the property or as to the securities in which it might or should be invested, but simply the postponement as regards the time of their coming into being of the interests respectively created by the will until after the death of the wife. however, been urged in argument that the word "entire" used in the codicil in connection with the word "estate" affords an indication of the testator's intention that his property should remain in specie until after his wife's death; but although the word in the original language from which it is derived may have imputed to a certain extent the meaning which we should express by saying that a thing is to be "preserved in its integrity," or "kept intact," I think that here the context shows that the expression "entire estate" is used in its ordinary and popular signification of "all" or "the whole" estate as distinguished from a part only There appears to me, therefore, to be nothof such estate. ing in the codicil which indicates an intention on the part of the testator that his residuary personal estate should not be converted, and when the will is read in conjunction with it I can see nothing there which should prevent the application of the rule which requires conversion. The specific mention in the residuary bequest of carriage and furniture does not constitute the bequest a specific one: In re Tootal's Estate (1). Nor, in my opinion, can the fact that many of the bequests in the will are specific, and require that the subject-matter 124] of them should be left in \*specie during the existence of the life estate, lead fairly to any inference that the residuary estate is also to be left in specie during the existence of such life estate; and, finally, although if we were at liberty to speculate upon the intentions of the testator apart from what he has expressed in his will and codicil, I should be disposed to think that he very probably intended his wife. to enjoy his property in the same state as that in which he

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left it at his decease, I cannot at the same time gather from those documents any indications that he did so intend, sufficient to override a well-established rule of construction, which, as Vice-Chancellor Wigram says in *Hinves* v. *Hinves* ('), "did not originally ascribe to testators the intention to effect such conversions," but required the conversion in order to effectuate the intentions of the particular testator that the objects of his bounty should take successive interests in one and the same thing.

Upon the questions relating to the policy for £3,000, and the mode in which it should be kept up, I concur in the views expressed in the judgment of Lord Justice Baggallay.

JAMES, L.J.: I also concur as to the last point in the views which have been expressed, and I do not think it

is necessary to add anything.

On the other point, as to the application of the rule in Howe v. Earl of Dartmouth (\*), I concur in the view taken by the Vice-Chancellor and the Lord Justice Thesiger. It is quite clear that the rule must be applied unless upon the fair construction of the will you find sufficient indication of intention that it is not to be applied; the burden in every case being upon the person who says the rule of the Court of Chancery ought not to be applied in the particular case. Now, in this case, we have this peculiarity, that the will per se can by no possibility afford us any evidence of intention, or any indication of intention, as to how the property was to be enjoyed between the tenant for life and the person entitled to it afterwards, because there was no tenancy for life at that time in the contemplation of the Then we come to the introduction of the tenancy for life by the codicil, and upon that codicil it appears to me that what was intended then was this: The testator \*said, "I have made my will; since then I have married; I make my wife tenant for life of my entire estate." It appears to me the natural mode of dealing with that would have been to read the will as if it contained a gift to his wife of an estate for life in the whole of his estate. If he had simply inserted in the will as the first gift, "I give to my wife the income, dividends, and annual produce of my entire estate," I think that would not have been, according to the fair construction of the decided cases, any indication of an intention that she was to have anything more than the income, dividends, and annual produce of the whole of the estate, that is to say, of that which would remain of the estate after the debts, funeral and testamentary

expenses, had been paid and the property had been converted, and properly dealt with according to the duties imposed upon his legal personal representatives. The other words, "I postpone the payment of all legacies, the distribution of all estates vested in me or over which I had a power of disposition, until after her decease," appear to me to indicate nothing more than what is implied by giving a life estate, that he means it to be paramount to any gift, however specific, however clear; that which he has given is not to be given to the legatees until after her death. It is merely amplifying the expression that there is to be an estate for life to the wife introduced into the will prior to and paramount to all the other dispositions in the will. That is the conclusion to which I have arrived, perhaps with some misgivings. But, upon the whole, I cannot satisfy myself that there is that sufficient indication which the court ought to find before it interferes with the established rule of the court. I therefore express my concurrence in the view taken by the Vice-Chancellor.

Solicitors for plaintiff: Farmer & Robins. Solicitors for defendants: Bridges, Sawtell & Co.; Plews & Irvine.

The dividends or increase of stock goes to the owner of the stock at the time they are declared: 14 Eng. R., 419; Brundage v. Brundage, 65 Barb.,

The profits and surplus fund of a bank, whenever they have accrued, are, until separated from the capital by the declaration of a dividend, a part of the stock itself, and will pass with the stock, under that name, in a transfer or bequest: Phelps v. Farmers,

etc., 26 Conn., 269.

A corporation having a surplus of earnings increased its capital stock, and the privilege was given each stockholder to subscribe at par for as many shares of the new stock as he held of the old. The executors of an estate which owned 100 shares of this stock, having sold sixty of these options, with the sum realized therefrom purchased forty shares of stock. Held, that these forty shares were capital and not income, and therefore did not go to the widow, who was entitled, under the will of decedent, to the income, profits and products of his estate for life, but belonged to the residuary legatees, to whom the capital was to descend after

the widow's death: Moss's Appeal, 24 Am. R., 164, 169 note, and cases cited; 83 Penn. St. R., 264, distinguishing Earl's Appeal, 28 Penn. St. R., 868, and Willbank's Appeal, 61 Penn. St. R., 256; Minot v. Paine, 99 Mass., 101; R., 256; Minot v. Paine, 99 Mass., 101; Dalland v. Williams, 101 Mass., 571; Leland v. Hayden, 102 Mass., 542; Brundage v. Brundage, 65 Barb., 397-9; Van Doren v. Olden, 19 N. J. Eq., 176.
See 5 Am. Law Rev., 540, 720; Green v. Green, 30 N. J. Eq., 451; Brundage v. Brundage, 65 Barb., 397-9.

Where the income of all a textstory.

Where the income of all a testator's property was given to his wife for life, with a gift over of the principal at her death; held, that the premium re-ceived by her on certain gold coin belonging to testator's estate was part of the corpus, and not income to which she, as life tenant, was entitled. Also, that the interest receivable by her must be computed from the date of the testator's death: Van Blarcom v. Dager, 31 N. J. Eq., 783, and see cases cited by reporter in note.

When an extra dividend is declared

out of the earnings or profits of a corporation in which stock is held, such C.A.

extra dividend belongs to the life tenant, unless part of it was earnings carried to account of accumulated profits or surplus earnings at the death of the testator, or at the time of the investment, if made since his death, in which case so much must be considered as part of the capital: Van Doren v. Olden, 19 N. J. Eq., 176.

A testator, by his will, gave to his wife the use of all his property until the majority of his daughter, when it was to be divided between them equally; in case his daughter died during her minority, the whole to go to his wife; in case the wife should die during the minority of her daughter, then the daughter was "to come in possession of all of said property, on arriving at the age of twenty-one years, previous to which to be handed out at the discretion of the executors hereinafter named;" in case of the death of both wife and daughter without issue, during the minority of the latter, the property to go to persons named in the will.

The wife died before the daughter, and the latter during her minority. Accumulations of income were made by the executors during the survivorship of the daughter. Held, that such accumulations passed to the ultimate legatees with the body of the estate, and did not belong to the estate of the daughter: Willets v. Titus, 14 Hun,

Where a testator devised certain lands to A., but subsequently sold the same and received therefor the bond and mortgage of the purchaser; held, the devisee did not take the bond and mortgage, though the testator supposed he would: Beck v. McGilles, 9 Barb., 85; Matter of Dowd, 58 How. Pr. R., 107, 109-110; Yardley v. Holland, 15 Eng. R., 422; Coulson v. Holmes, 5 Sawyer, 279, 7 Cent. L. J., 446, U. S. Dist. Court, Oregon.

So where the testator received other lands in exchange for lands devised to his wife, though the testator was assured by the scrivener the substituted lands would pass, and left no other property: Gilbert v. Gilbert, 9 Barb., 532.

A testator bequeathed to W. L. £1,500, "due to me by R. C., and setured by mortgage." After the making

of this will, and in the testator's lifetime, R. C. sold to one H. the property mortgaged, and the testator, to facilitate the sale and secure the debt due him, took from H. a mortgage of this property and other property, and a covenant to pay the amount; retaining in his possession the mortgage from R. C., under which he held the legal estate in the land, and the bond originally obtained from R. C. for payment of the debt. The testator died without in any way altering his will in regard to this legacy: Held that the legacy was not adeemed: Loring v. Loring, 12 Grant's Chy., 108.

By a sealed instrument, dated March 28, 1867, the complainant and respondent, both corporations, agreed, the complainant to sell, and the respondent to buy, part of the complainant's property, payment to be made at the option of the complainant, either in cash or in shares of the respondent's capital stock at their value on that day, the value of the property and of the shares to be determined by referees, whose award was to be made within six months, and the transfer and payment to be made within ten days after the award. The award was made September 26, and the complainant chose to be paid in stock.

The respondent, between March 28 and Oct. 6, which was the tenth day after Sept. 26, made four dividends. The respondent, after the award, issued under its charter new stock, with which payment was made to the complainant.

The complainant thereafter filed a bill against the respondent, charging that payment should have been made in shares previously existing, and not in newly issued stock, and claiming a right to the profits and increment of the respondent's capital stock between March 28 and the day of payment.

Held, that the complainant was not entitled to relief.

The actual payment and transfer was made Nov. 9, the respondent subsequent to Oct. 6, and before Nov. 9, declared one dividend.

Held, that as to this dividend the complainant was entitled to relief in a sum to be fixed by a master, if not agreed on by the parties: Union Screw Co. v. American Screw Co., 11 R. I., 569.

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## [8 Chancery Division, 126.]

C.A., Feb. 13, 1878.

# 126] \*In re Church and Empire Fire Insurance Fund. Andress' case.

Winding-up—Companies Act, 1867, s. 25—Payment in Cash—Allotment of fully paid-up Shares for Services.

The proprietor of a newspaper agreed with a company to insert a series of advertisements in consideration of seventy-five fully paid-up shares in the company. Fully paid-up shares were accordingly allotted to him, but no contract was registered, as required by the Companies Act, 1867, s. 25. He sent the company a receipted bill and inserted the advertisements. The company was afterwards ordered to be wound up:

Held, that, as at the time of the allotment there was no debt payable to the allottee in cash by the company, the case was not within Sparge's Case (1); for that the allottee could not have sustained a plea of payment in an action by the company for calls, and that he must therefore be placed on the list of contributories as a holder of shares on which nothing had been paid.

(1) Law Rep., 8 Ch., 407; 5 Eng. R., 626.

[8 Chancery Division, 129.] C.A., Feb. 20, 1878.

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## \*CLEMENTS V. NORRIS.

[1877 C. 209.]

Partnership—Expiration of Lease of Place of Business—Renewal of Lease.

C. and N. entered into partnership for twenty one years as ironmongers under articles which provided that the business should be carried on for twenty-one years at the G. R. premises, or "in such other place or places as the partners may agree upon." Afterwards the partners agreed to add to their business that of ironfounders, and took for that purpose the G. Q. works. The lease of these works expired during the partnership, and C. declined to concur in a renewed lease. N. thereupon took a renewed lease of them in his own name, and insisted on his right to continue to carry on the ironfounding business there on account of the partnership:

on the ironfounding business there on account of the partnership:

Held, that as the partnership business could only be carried on in such place as the partners agreed upon, if they did not agree upon a place it could not be carried on at all, and that one partner, in the absence of express powers for that purpose, could not, without the consent of the other, although the partnership was to continue 130] for a definite term, renew on account of \*the partnership a lease of the property on which the business had been carried on:

Held, therefore, that C. was entitled to an injunction to restrain N. from employing the assets or pleading the credit of the partnership in carrying on business at the G. Q. works.

This was an appeal by the plaintiff from an order of Vice-Chancellor Hall refusing a motion for a receiver and injunction. The point on which the decision of the Court of Appeal turned was not raised below, and the points discussed before the Vice-Chancellor were not of such a nature as to call for a report.

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The defendant Norris, Thomas Quarm, since deceased, and the plaintiff, became partners in 1861 under articles of partnership dated the 23d of February, 1861, the first clause of which provided that they would become partners "in the trade or business of ironmongers, engineers, and general contractors for ironworks, and in every other trade or business connected therewith or incidental thereto, as heretofore carried on by the said John William Jeakes."

The second clause provided that the partnership should continue for the term of twenty-one years, less lifty-four days, from the 22d of February, 1861. The third article related to the name of the partnership, which was carried on under the firm of "C. Jeakes & Co." The fourth article was, "That the said trade or business shall be carried on in the several premises so respectively assigned and leased to the said parties hereto as hereinbefore recited" (being leasehold premises belonging to Mr. Jeakes, and known as the Great Russell Street premises), "or in such other place or

places as the said parties hereto may agree upon." Jeakes had not carried on the business of an ironfounder, nor did the partners at first do so, but in 1863 the firm purchased a foundry business, and what took place was stated as follows by the defendant in paragraph 9 of his statement of defence: "In or about the month of November, 1863, the firm met with and purchased certain foundry premises at Great Queen Street and the business connected therewith, and the firm agreed that thenceforth the business of the partnership should not only be that of ironmongers, engineers, and general contractors for ironwork, as provided by the articles, but that also of founders." Again, in paragraph \*27, "There was an arrangement between the partners that they should add the business of founders to that of the other business of the partnership. This arrangement was not subject to be determined at the will of any partner, but formed an essential part of the partnership, and could only be altered with the consent of all the partners." This was denied by the plaintiff, who by paragraph 14 of the statement of claim alleged that there was no agreement binding the partners to carry on the ironfounding business for any longer period than they should mutually agree upon. Quarm died in 1872, and the partnership went on between the plaintiff and defendant, the Great Queen Street business being carried on under the style of Norris &

The lease of nearly the whole of the Great Queen Street premises expired on the 29th of September, 1876. The deClements v. Norris.

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fendant wished the lease to be renewed, and the foundry business continued, but the plaintiff, who wished the foundry business discontinued, declined to agree to any renewal. The defendant thereupon took a renewed lease of the property in his own name, but, as he stated, on behalf and for the benefit of the firm, and he continued to carry on the Great Queen Street business in the name of Norris & Clements, and insisted on his right to do so.

The plaintiff in 1877 commenced this action, alleging that the defendant was carrying on the Great Queen Street business in the name of Norris & Clements for his own benefit, and also alleging breaches by the defendant of the partnership articles, and asking for a dissolution and an account, for a receiver and manager, and for an injunction to restrain the defendant from interfering with the business or effects

of the partnership.

The plaintiff moved for a receiver and manager, and for an injunction, and the motion having been refused by Vice-

Chancellor Hall, the plaintiff appealed.

Dickinson, Q.C., and Swanston, Q.C., for the appellant: We ask for a injunction to restrain the defendant from employing the assets and pledging the credit of the partnership in a business which does not belong to it. When the lease of the Great Queen Street premises had expired, the defendant had no more right to take a new lease of that 132] property without our \*consent than he would have had to set up the business somewhere else without our consent, and it is not pretended that the plaintiff did consent.

sent, and it is not pretended that the plaintiff did consent. W. Pearson, Q.C., and Maidlow, contrà: The partnership was to continue for twenty-one years, the lease of the place where the business is carried on expires, and it is not reasonable that one partner should be allowed to stop the concern by refusing to concur in any steps to take a place for carrying it on. We submit that one partner must, under such circumstances, have an implied power to renew the lease in order to give effect to the paramount intention that the business should be carried on for twenty-one years. Even the limited injunction now asked will in all probability stop the whole business of the partnership.

JESSEL, M.R.: This is an appeal from a decision of Vice-Chancellor Hall, refusing an order for a receiver and for an injunction. Having had the advantage of listening to the reading of the shorthand writer's notes of the Vice-Chancellor's judgment, I cannot help feeling that the point on which I am about to express an opinion was not considered by his Lordship, and therefore, in differing from him as to

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the result, I am not really differing from any portion of the

judgment he delivered.

The action by the plaintiff, who is a partner with the defendant, seeks a dissolution of the partnership, with an injunction and receiver generally, but it also has a special ground of injunction relating to a portion of the business carried on in Great Queen Street. [His Lordship then, after stating the facts of the case to the same effect as above, and saying that he would assume the above allegations in the

statement of defence to be correct, continued:

The defendant, without the assent of the plaintiff, chose to take a renewal in his own name of the lease of the Great Queen Street premises, for the purposes, as he says, of the partnership, and he insists upon his right of carrying on in the Great Queen Street premises, under the renewed lease, the foundry business in the name and in behalf of the partnership. The question raised by \*this appeal is [133] whether he has any such right, and I think he has not. the first place, supposing there were no partnership articles at all, is there any implied authority given by law to one partner enabling him to take property on lease for the purpose of carrying on a portion of the partnership business? authority has been cited, nor am I aware of any, in support of the affirmative. The partnership business, consisting as it does here of several businesses, may cease to be carried on in part because the partners cannot agree upon the selection of a new place to carry it on, but I know of no way in which we can impose on the other partner or partners the obligation of allowing it to be carried on at the place any one partner might choose because the other partner or partners could not agree with him in selecting a place. mere question of contract. There is not, in my opinion, any foundation for the argument that the stipulation as to the time during which the business is to be carried on is paramount to the stipulations as to the place of carrying it on, or as to the nature of the business. They are all matters of contract, and if the contract is imperfect, leaving certain essential matters to be subsequently decided by the agreement of the partners, I am not aware of any authority in a court of justice to decide for them. They must be left to decide for themselves, and if they cannot agree the contract fails, as any contract which is indeterminate upon any essential points must fail if the parties cannot come to the subsidiary agreement which is necessary to give full effect to The essence of partnership is mutual agreement and consent, and to ask a court of justice to say that a certain 25 Eng. Rep.

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place is a reasonable place for carrying on the business, and that it is taken upon reasonable terms having regard to the nature of the business, appears to me to be an attempt to impose upon judges functions which they are not competent to exercise. How can a judge decide what is a proper place for carrying on a particular business? How can he say that the rent is a fair one so as to afford a profit or a reasonable prospect of a profit in carrying it on ! How is he to acquire the knowledge? Is it reasonable that it should be submitted to a judge or a jury, upon the conflicting opinions of experts, whether a place at Millwall or Bankside is a proper place, or whether the rent asked is a reasonable rent with reference to the nature of the property per se, or 134] \*whether it is reasonable with regard to the nature of the business to be there carried on? It is quite obvious that these things are not within the purview of courts of justice; they are intended by the parties to be matters of agreement, and matters of agreement they must remain. Thus far I have dealt with the law apart from any articles of partnership, but in this particular instance we have a clause which says that the business of the firm is to be carried on upon the particular premises mentioned in the articles, "or in such other place or places as the said parties hereto may agree upon." Now, if we add the business of ironfounders to the other four businesses, still the parties may agree upon the place, and when they have agreed upon the place, if the term for which that place is held runs out there must be a new agreement for a new place or for taking a renewed lease of the old place. Therefore, as it appears to me, we should be making a new contract for the parties if we said that one of the partners without the assent of the other could renew this lease upon such terms as he thought reasonable, and carry on the trade there in spite of the other partner. That being so, my opinion is that the plaintiff was entitled to an injunction restraining the defendant from employing any part of the partnership assets, and from pledg-ing the credit of the partnership in or for the purpose of carrying on the foundry business in Great Queen Street in the pleadings mentioned, or in paying any of the liabilities thereof which accrued from the 29th of September, 1876, the date of the expiration of the lease. If the defendant decides, on consideration, that the result of that injunction will be to prevent his carrying on the remainder of the partnership business, then of course the right order to substitute for this order will be an order for the appointment of a genClements v. Norris.

eral receiver, but if he does not so think, the order will be for an injunction such as I have stated.

BAGGALLAY, L.J.: I am of the same opinion, and have nothing to add to what the Master of the Rolls has said as regards the general merits of the case. I should have been glad, if I could have seen my way to it, to have concurred in appointing a receiver and manager either as to the whole or as to a portion of this business, because I think that \*such appointment would be for the advantage of [135] both parties during the time which must elapse before the questions between them can be decided, but I do not see my way to our doing so except by consent. I think, however, there can be no question as regards the propriety of granting the injunction to the extent which the Master of the Rolls has mentioned. If it has the effect, as suggested by Mr. Pearson, of paralyzing the whole concern, it will be, I am sure, to the interest of both parties to arrange to take a decree for dissolution and winding-up of the affairs; but that is matter for their consideration and not for ours.

THESIGER, L.J.: I am of the same opinion. It was competent for the parties, if they had been so minded, to have agreed not only that the foundry business should be carried on for the whole period of twenty-one years, but also, in order to effect that object, that one partner should have authority in the name of the partnership to obtain a renewal of the lease of the premises on which such business was originally carried on; but the parties in the present case have not so agreed. The statement of defence does not allege that they did so agree, and the conduct of the defendant in taking the renewed lease in his own name is entirely inconsistent with their having done so.

That being so, the court has no power to imply an agreement to the effect referred to. The terms upon which partnership premises are taken form a most important element in partnership arrangements, and must be left to the contract of the parties; and while that is true as a general proposition of law, in the present case we find that the parties themselves have by article 4 of their agreement made a distinct stipulation upon the point. My only doubt on the matter, if doubt it can be called, has been whether the court ought to interfere by injunction upon a ground which is not the substantial ground put forward in the plaintiff's statement of claim; but that doubt is removed by the consideration that in the present case the larger ground upon which the plaintiff's claim is rested includes the smaller, in other words, that the objection to continue the foundry business

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at all includes the objection to carry it on in Great Queen 136] Street; and the facts set out \*in the statement of claim are therefore sufficient to raise, and do raise and connect, both the objections to which I have referred.

For these reasons, I also think that the appeal should be

allowed.

Solicitors: Scott, Jarmain & Trass; Chamberlain.

[8 Chancery Division, 186.]

V.C.H., June 13, 1877. C.A., Feb. 22, 1878.

HATFEILD V. MINET.

[1875 H. 74.]

Advancement to Children—Statute of Distributions (22 & 23 Car. 2, c. 10), s. 5— Annuity granted in Intestate's Lifetime.

By a deed of separation the husband covenanted to pay an annuity of £200 to each of his daughters during their respective lives, such annuities to cease if he should again cohabit with his wife, which event did not happen. The husband survived his wife and died intestate. In the distribution of his personal estate among his children under the Statute of Distributions:

Held (reversing the decision of Hall, V.C.), that so much of the annuities to the daughters as were paid during their father's lifetime were not in the nature of advancements; and that the value of each annuity must be estimated as at the death

of the intestate, and the amount brought into hotchpot.

This was an action for the administration of the estate of

Charles William Minet, an intestate.

By an indenture dated the 19th of October, 1860 (being a deed of separation between C. W. Minet and Leah his wife), C. W. Minet covenanted with two trustees to pay to each of his six daughters, Fanny, Susan, Gertrude, Geraldine, Georgina, and Delia, during their respective lives, an annuity of £200, but subject to a proviso in the said indenture contained, that if the said C. W. Minet should at any time thereafter by deed or will settle any lands or hereditaments, or any moneys or other personalty, upon any of his said daughters, the annual income for the time being received by any such daughter by virtue of any such deed or will should be taken and received by such daughter in discharge pro tanto of her annuity: And it was also declared that during the respective minorities of the daughters who were then under age the annuities should be paid to Leah Minet, the 137] wife of the said \*C. W. Minet, for their maintenance and education: Provided always that in case the said C. W. Minet and Leah Minet should at any time thereafter, with their mutual consent, come together and cohabit as man C.A. Hatfeild v. Minet.

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and wife, then and from thenceforth the said annuities should cease.

Fanny Minet married R. T. N. Tubbs, and by her marriage settlement, dated the 10th of September, 1861, she assigned

her annuity of £200 to the trustees of the settlement.

Susan Minet married Sir C. W. D. Staveley, and by her marriage settlement, dated the 29th of October, 1864, her father, C. W. Minet, covenanted for the immediate payment to the trustees of the settlement of the sum of £5,000; but it was provided that the covenant should not be put in force during the lifetime of C. W. Minet, or until six months after his death if he in the meantime paid to the trustees interest

on the said sum of £5,000 at the rate of £4 per cent.

Delia Minet married O. G. Parker, and on her marriage C.W. Minet, by deed poll, dated the 16th of October, 1871, appointed the sum of £6,100 India 4 per Cent. Stock to be held in trust for his said daughter Delia, and by the same deed he released to her his life interest in the same sum of stock, and covenanted to pay to the trustees an annuity of £60 during the joint lives of himself and his daughter. By an indenture of even date Delia Minet, with the privity of her intended husband, released her father from the said annuity of £200.

Gertrude Minet married T. G. Hatfeild, and on her marriage C. W. Minet, by deed-poll, dated the 30th of January, 1872, appointed a like sum of £6,100 India 4 per Cent. Stock to his said daughter Gertrude, and by the same deed released to her his life interest in the same sum of stock. By an indenture of even date Gertrude Minet released her father

from the said annuity of £200.

Gertrude Hatfeild died in November, 1872, leaving one child, the plaintiff Gertrude Hatfeild, who was an infant.

Georgina Minet married H. B. Patton, and assigned her

annuity to the trustees of her marriage settlement.

Mrs. Minet died in 1871 without having returned to live

with her husband.

\*C. W. Minet died intestate on the 27th of Febru- [138 ary, 1874. His daughter Geraldine Minet, who was unmarried, took out administration to his estate. The action was brought against her for the administration of the estate, and the plaintiff prayed that in the distribution the advances made by the intestate to his children in his lifetime might be brought into account. The principal question when the action came on for trial related to the manner in which these advances should be calculated.

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The case was heard before Vice-Chancellor Hall on the

13th of June, 1877. Hastings, Q.C., and Armstrong, for the plaintiff and Mr. The correct principle and Mrs. Parker and their trustees: for ascertaining the value of the annuities is to take the actual payments ascertained to have been made, which will give the value as to those who died in the lifetime of the settlor, and to add to that, in the case of those who survived the settlor, the value of an annuity from his death, calculated according to the Succession Duty Tables. Then as to the two who released their annuities, namely, Mrs. Hatfeild, the plaintiff's mother, and Mrs. Parker, that must be taken as a repurchase, and the value of the annuity at the time of the repurchase must be deducted from the value at the time of the grant, and the advancement would be the difference between those two values. It must be borne in mind that these were not advancements in the ordinary sense of the word, as the father had only a power of appointment over a fund in which he had a life interest, so that it was only an advance so far as it was a surrender of his life interest; the Chief Clerk has so treated it, and it is the correct view, and the view

most favorable to the infant plaintiff. Kekewich, Q.C., and John Henderson, for Miss Minet and Lady Staveley: The proper course is to value the annuities at the time of their grant, that is, at the date of the separation deed of the 19th of October, 1860. There appears to be only one authority reported upon the point: 139] Kircudbright v. Kircudbright ('). That was a \*case of a peculiar nature, in which a father had given a bond to secure an annuity to his son until the son should be in possession of a living of a certain value, and the son entered into a counter agreement that he would forthwith enter The son received the holy orders and accept the living. annuity for nine years, but had not complied with the condition; and the father having died, Lord Eldon, while doubting the validity of the bond, decided, on the ground of noncompliance by the son, that the annuity was determinable by the father or his representatives, and that, payments having been made in respect of it, the annuity was an advancement to be brought into hotchpot, "viz., the value at the date of the grant, or if it has ceased, the payments received, at the option of the child." That is a decision that, whatever may be the difficulty in valuing the contingencies, yet the annuity must be valued at the date of the grant (valuing the contingency as best you can), except in the one

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case where the annuity has ceased, and then the child is to have the option. Here there are three annuities subsisting, and one, that of Mrs. Hatfeild, has determined, so that no option can be exercised as to it; the fairest way, therefore, seems to be to treat all the annuities on the same footing, and to value them all at the date of the grant. In Wroughton v. Colquhoun ('), where a testator's assets were insufficient to satisfy an annuity and the pecuniary legacies given by the will, it was held that the annuity ought to be valued, and that the annuitant was entitled at once to the amount of the valuation, subject to an abatement in proportion to that on the pecuniary legacies. It must be borne in mind that the payments made by the testator in respect of these annuities were not by way of advancement, but in discharge of a legal liability.

Dickinson, Q.C., and W. Barber, for Mr. and Mrs. Tubbs, and Mr. and Mrs. Patton's settlement trustees, and Miss Minet, supported the same contention, and referred to Boyd

v. Boyd (\*) and Williams on Executors (\*).

Hastings, in reply: The object should be as far as possible to secure equality among \*the children, and this [140] would not be attained by valuing each annuity at the date of the grant, for the parties entitled to the three subsisting annuities will be in a better position than Mrs. Paker and the infant plaintiff, as, although the annuities of the latter were released or determined, one in 1871 and the other in 1872, they will be charged at the value in 1860 of annuities for younger lives than those of the subsisting annuitants. The course adopted by the Chief Clerk, on the other hand, will produce equality. In Kircudbright v. Kircudbright (') the annuity in question was treated as having determined, and the decision does not apply as an authority to a case where there are subsisting as well as determined annuities, all granted by the same instrument. Whether the payments in respect of these annuities were made under a legal obligation or not, they must be treated as advancements. But if the court thinks that the principle contended for by the other side should be adopted, two out of the six annuities in this case were repurchased by the settlor, not out of the appointed £6,100, but by giving to the annuitant in exchange the settlor's life interest; and accordingly, if the annuity is in these two cases to be valued at the date of the grant, it ought also to be valued at the date of the repurchase or substitution, and the value at the one time should be deducted

<sup>(1) 1</sup> De G. & Sm., 857. (2) Law Rep., 4 Eq., 305.

<sup>(3) 7</sup>th ed., p. 1508. (4) 8 Ves., 51.

from the other, the difference between the two values being the amount of the advancement to be brought into hotchpot by these two children; otherwise they are charged twice over, i.e., with the value of the annuity in 1860 and with the income received on the £6,100 during the settlor's life.

Hall, V.C.: That does not produce justice. The question is, whether you are not to be charged with the value of the annuity as an annuity at the time of the advance, that is, at the time of the annuity being granted, and then the subsequent dealing with that annuity is matter of arrangement between the father and the child, and it is not the less an advance because the child has dealt with the father by arrangement for a valuable consideration. It does not cease to be an annuity to which the child was entitled. The child might have sold that annuity to anybody else, or made an 141] \*arrangement with somebody else about it. That would not be less an advance.

Hastings: Then the sum given for it, i.e., the interest upon the £6,100, ought not to be brought into account; for the child should not be charged twice over.

Kekewich, in reply upon the last point.

HALL, V.C.: I think I must disregard for the present purpose, in applying the statute, the arrangement so come to. I cannot take it both ways, as Mr. Kekewich wishes me to do; I think that would be unreasonable and unjust. I must consider that arrangement as not having taken place at all, for the purpose of ascertaining the amount of the advance. I must take the amount of the advance as the sum which was covenanted to be paid by the settlor, that is, the annuity of £200 in each case, and take the value in each case as from the date of the settlement, having regard to the age of the annuitants at the time, and calculating the value of the annuities according to the Succession Duty Act.

With reference to Lady Staveley's annuity, the clause in the separation deed is that the annual income of the fund settled shall be taken pro tanto. So long as the income of the fund will satisfy the annuity it must be taken as a satisfaction, but there must be liberty to apply, and there must be some reasonable sum retained. That will meet any possible deficiency between the £200 a year which the testator covenanted to pay to Lady Staveley and the income which will be produced by the £5,000 when invested by the trustees, which is to go as far as it will extend in satisfaction of the £200 a year income, and there will be liberty to apply. Some agreed sum representing the difference between £5,000 at £4 per cent. and £5,000 at £3 per cent. had better be

taken as Lady Staveley's guarantee annuity fund and invested, so that the income can be resorted to in case of any deficiency.

My decision as to the £200 annuity to Lady Staveley will be applicable also to the £60 annuity which the father on Mrs. \*Parker's marriage covenanted to pay to her [142 during their joint lives. Sums will, of course, be set apart to answer the other annuities.

From this decision Lady Staveley appealed. The appeal

was heard on the 22d of February, 1878.

Kekewich, Q.C., and John Henderson, for the appellant: With respect to the valuation of the annuities, the appellant supported the view taken by the Vice-Chancellor at the hearing before him; but on working out the decree it is unfavorable to her, and she therefore appeals from it. We contend that the value of the annuities ought to be ascertained at the death of the intestate.

[James, L.J.: How is it possible to ascertain the value of the annuities at the date of the deed of separation, or indeed at any time before the death of the husband or wife? The deed provides that they shall cease if the husband and wife

cohabit again.]

That point was not considered at the previous hearing, but it is an additional reason why the Vice-Chancellor's decree is erroneous. One daughter being dead, a difficulty is introduced, and the court has a discretion in doing justice under the statute, and must take all circumstances into account. In the present case justice will be done by adding to the present value of the annuties the actual amount received by them during their father's life: Todd v. Bielby ('); Potts v. Smith ('); Wright v. Lambert ('); Jones v. Jones ('). The decree is also erroneous in not dealing with the appointment of £6,100 East India Stock to Mrs. Hatfeild and Mrs. Parker as advancements. The life interests of these sums, so far as they exceed the annuities, ought to be brought into hotchpot.

Hastings, Q.C., and Armstrong, for the plaintiff and Mr. and Mrs. Parker and their trustees: The income of the East India stock ought not to be brought into account. The annuities were the absolute property of the daughters, \*and they purchased the East India stock with them. [143] The transaction was not an advancement at all, but a pur-

<sup>(1) 27</sup> Beav., 858. (2) Law Rep., 8 Eq., 688. 25 Eng. Rep.

<sup>(8) 6</sup> Ch. D., 649; 28 Eng. R., 258. (4) 5 Hare, 440.

find at once that the various annuities, to which reference has been made in the course of the argument, spring out of one transaction, namely, a separation deed between the father and the mother, and that upon that occasion the father and the mother, with the consent of the trustees, came to the conclusion that the fair and proper mode of making a provision for the maintenance of the six daughters was to secure to each of them an annuity of £200 for her life. In other words, the securing of the annuity was the mode in which the father discharged the obligation of providing maintenance.

No doubt there is the difficulty which Mr. Dickinson suggested, that the obligation on the part of the father for the maintenance, education, and support of his several children was different with regard to each individual daughter, varying in respect of their respective ages and possibly modified by other circumstances, but I think that we must have regard to the fact that the general system of equality is that to which we must give effect; and having regard to all the circumstances of the case, I am of opinion that the fair and equitable mode is to treat the period of the father's decease as the time when the obligations binding on him as a parent 146] should cease, and that any payments \*thenceforth made under the provisions of the deed should be treated as advances. Upon that principle it would be a mere matter of calculation.

THESIGER, L.J.: I am of the same opinion. If these annuities could have been looked upon as advancements in the lifetime of the father, and there had been no difficulty in ascertaining the contingency, it seems to me that the theoretical and just mode of valuing them would have been to value them from the date of the settlement; but here we have, first, the doubt as to whether they were advancements at all during the lifetime; and, secondly, we have the difficulty of ascertaining the value at the date of the settlement, owing to the doubtful character of the contingency; and therefore it seems to me that the just and proper way is to deal with the valuation as proposed.

Solicitors: Dawes & Sons; Young, Jackson & Beard.

See 22 Eng. R., 696 note; 23 Eng. R., 660 note.

Advancement is a question of intent; that intent must be proven to have existed at the time of the transaction, and by the contemporary acts and declarations of the parties.

Verbal declarations of a parent that money, for which he held a note or

bond against a child, was intended as an advancement, are insufficient to establish it. They must be shown to be a part of the res gestes and accompany the acts done.

If, however, there be evidence of acts done or declarations made at the time of the transaction tending to prove that the money was so intended by the

interested:

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father, his subsequent acts and declarations in recognition of the original act and intention are entitled to weight · Merkel's Appeal, 89 Penn. St. R., 340; Watkins v. Young, 31 Gratt. (Va.), 84.

So where a husband pays for land and takes a deed to his wife: Irvine v. Green, 32 Gratt. (Va.), 412.

A testator held notes of his son, which were dated prior to the date of his will. In his will he stated a certain sum as due to him from said son, and then declared, "should I make any further advances, I will charge the same in my account book as heretofore." No further charge could be found after testator's death. In the will testator also spoke of this sum due from the son as "loaned" to him: Held that, notwithstanding the use of the word "loaned," the notes were to be considered as part of an advancement and not as a separate debt; that the words "advanced" and "loaned" were used interchangeably. Technical rules of construction must give way to the plainly expressed intention of a testator; and where, in aid of a written

instrument, its intention can be gathered from undoubted proofs, the equities of parties claiming under it are not to be overthrown by a rigid adherence to one alternative meaning of an equivocal technical word.

If, after advancements, a will be made, the intention of the testator is matter of fact determinable from the will itself, and from extrinsic matters and testimony: Wright's Appeal, 89

Penn. St. R., 67.

Where land was conveyed by a father for the benefit of his daughter by a deed purely voluntary, which reserved to grantor the right to use, occupy and enjoy the land, and even to revoke the gift, and the grantor did take possesion of such land four years thereafter and keep it, and received all the rents and profits for fourteen years, and then died intestate, such land is an advancement to the daughter, but only as of the date of her father's death, to be estimated at its then value, according to its condition at that time: Hughey v. Eichelberger, 11 South Car., 36, 50-3.

[8 Chancery Division, 147.]
M.R., Jan. 25, 1878.

\*Foster v. Parker.

[1877 F. 81.]

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Mortgage—Foreclosure—Mortgagor's Estate in Infant Heir-at-Law—Form of Decree.

In a foreclosure action, where the estate of the mortgagor was devised in trust for sale and had become vested in an infant, who was also one of the persons beneficially

Held, that the decree should contain a direction that, in case the mortgagees were not redeemed within six months, the infant should be a trustee for them within the meaning of the Trustee Act, and the executrix of the mortgager be ordered to convey the estate to the mortgages on his behalf.

This was a motion by the plaintiffs in a foreclosure action, who claimed under a deposit of title deeds, to vary the minutes of decree.

The mortgagor had died, having by his will devised his real estate to trustees upon trust for sale and to divide the proceeds among his children. The trustees having disclaimed, the estate descended to the eldest son and heir-at-law of the mortgagor, who was an infant, and who was made a defendant to the action.

At the trial of the action the usual foreclosure decree was

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made, but the Registrar in drawing it up gave the infant heir-at-law six months after coming of age to redeem.

Dundas Gardiner, for the plaintiffs, now moved to vary the minutes by adding a declaration that in case the plaintiffs were not redeemed within six months, the infant should be a trustee for them within the Trustee Act, and that his mother, who was executrix of the mortgagor, should be

ordered to convey on his behalf.

Cozens-Hardy, for the defendants, contended that, as the infant was beneficially interested, he was entitled to have six months after coming of age to show cause, Newbury v. Marten ('); also, that the court ought not to make any such declaration at least until the order for foreclosure had been made absolute: Smith v. Boucher (\*); Lechmere v. Clamp (

\*JESSEL, M.R., said that for the purposes of this 1481 action the infant stood solely in the position of a trustee, and

that the minutes must be varied accordingly.

Solicitors: Cole & Jackson; Field, Roscoe & Co.

(9) 1 Sm. & Giff., 72, (1) 15 Jur., 166.

(\*) 30 Beav., 218; 31 Beav., 578.

[8 Chancery Division, 148.]

M.R., Feb. 22, 1878.

FREEMAN V. COX.

[1878 F. 19.]

Payment into Court-Motion-Non-appearance of Defendant-Sufficient Admission,

In an administration action notice of motion was served upon a defendant, an executor, for payment into court of money, part of the testator's estate, which it was shown by affidavit that he had received. The defendant did not appear on the motion:

Held, that, the defendant not having disputed the affidavit, there was a sufficient admission that the money was in his hands, and that he must be ordered to pay it

into court.

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#### [8 Chancery Division, 150.] M.R., March 8, 1878.

# \*In re Longdendale Cotton Spinning Company. [150

Chancery Court of Lancaster—Action—Jurisdiction—Person within but Property be-yond Local Limits—Chancery Jurisdiction in Personam—Company—Action by Mortgagee after Winding-up Order—Court of Chancery of Lancaster Act, 1854, s. 7 -Judicature Act, 1878, s. 18, subs. 2.

The principle under which the jurisdiction in personam of the old Court of Chancery extends, in effect, to property wherever situate, applies to the Chancery Court of the County Palatine of Lancaster.

Thus, where the defendants in an action in the Chancery Court of the County Palatine of Lancaster were within but their property was beyond the boundary of the local jurisdiction, it was held that the jurisdiction of that court was the jurisdiction in personam of the old Court of Chancery within the boundary, and therefore that the Palatine Court could exercise jurisdiction over the property, and could enforce any order in the action by applying to the Supreme Court under the Court of Chancery of Lancaster Act, 1854, s. 7, and Judicature Act, 1873, s. 18,

Motion by the defendants to stay the action for want of jurisdiction refused

with costs.

The mere fact that an order has been made for winding up a company does not prevent a debenture holder or mortgagee of the company from bringing an action to realize his security.

> [8 Chancery Division, 156.] M.R., March 25, 1870.

\*In re HEDGMAN.

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[1878 H. 66.]

Charity-Mortmain-Gift of Money to "support or found" a School-9 Geo. 2, c. 86.

A gift by will of money for the "support" of a school does not necessarily imply that the money is to be "laid out or disposed of in the purchase of any lands, tenements, or hereditaments," so as to render the gift void under the Mortmain Act

(9 Geo. 2, c. 36).

A testator bequeathed a sum of money to trustees to be applied by them in "supporting or founding" free or ragged schools for poor children in a particular parish. For some years prior to the date of the will and down to the testator's death there existed in the parish a school for the children of \*the poorest inhabitants, [157] the testator being its principal supporter. It was held in a hired room, the rent of which was paid by the testator, who also paid the teacher's salary:

Held,—reading the will as creating an alternative trust,—a good charitable gift.

SPECIAL CASE. James Hedgman, who died in April, 1877, by his will, dated in November, 1876, bequeathed to his trustees "the sum of £3,000 to be applied by them in supIn re Hedgman. Morley v. Croxon.

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porting or founding free or ragged schools for gutter children or for the poorest of the poor."

By a codicil the testator directed "that such schools or school should be situate in the parish of Barnes, in the county of Surrey, and should be for the resident poor of the

said parish."

At the date of the will there existed, and had existed for some years previously, in the parish of Barnes, where the testator resided, a free school for the younger children of the poorest inhabitants; this school continued to exist down to the testator's death, and was still existing; it had been and was still held in a room rented for the purpose on a yearly tenancy, and was presided over by a female teacher. The school was originally established through the exertions of the rector of Barnes, but in 1872 the testator became its principal subscriber, and from the year 1874 until his death he paid the rent of the room where it was held, and the teacher's salary, and took upon himself the whole pecuniary responsibility in connection with the school.

The question for the opinion of the court was whether the

bequest of the £3,000 was valid.

Byrne, for the plaintiffs, the trustees of the will.

Rigby, for the Attorney-General, defendant: This is a good charitable gift. The gift is in the alternative, "supporting or founding." "Founding" might imply building and so render the gift void under the Mortmain Act, 9 Geo. 2, c. 36; I therefore rely on "supporting," which does not necessarily imply a direction to build or purchase land for the purpose. "Supporting" may be equivalent to providing," and mean hiring a room or building, as in Johnston 158] v. Swann ('); and the fact that \*this school was being held in a hired room at the date of the testator's will and of his death affords a strong presumption in favor of that meaning. This is a gift for educational purposes, and is therefore charitable: Beaumont v. Oliveira (').

Whitehorne, for the defendants, the residuary legatees: This is not an alternative gift. The testator in speaking of "supporting or founding" means one and the same thing. The two words cannot be separated so as to make two distinct gifts. Of the numerous cases on the subject there is not one in which the words "supporting" and "founding" occur together, but Hopkins v. Phillips () is a distinct authority that a bequest to "found" a chapel implies build-

ing, and is therefore void.

A gift to "establish," which is equivalent to "found," is

((1) 8 Mad., 457.

(\*) Law Rep., 4 Ch., 309.

(3) 3 Giff., 182.

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also bad: Attorney-General v. Hodgson ('); Re Clancy ('); Longstaff v. Rennison (\*); Attorney-General v. Hall (\*)

The testator evidently contemplated the creation of a building, and the rule is now well settled, that, to be valid, a charitable gift for building must refer to an existing site, or expressly exclude the application of the money in the purchase of land: Pratt v. Harvey (\*); Edwards v. Hall (\*); Hawkins v. Allen (\*); Cox v. Davie (\*).

Whatever meaning, then, may be attributable to the word "supporting," one part of this gift is clearly illegal; and the rule is that where the illegal part of a gift is inseparable from the legal, you are not at liberty to select the legal part and discard the illegal, but the whole is bad. In short, the invalidity of the one affects the validity of the other. In all cases of alternative gifts, where the one has been held good and the other bad, the testator has clearly indicated an intention that one or the other shall take effect, as in Dent v. Allcroft (\*) and Edwards v. Hall.

I submit, therefore, that this gift is void, and that the

£3,000 falls into the residue.

\*Jessel, M.R.: Whether the cases upon this sub- [159] ject will ever cease it is impossible to say. The authorities are already too numerous to mention, but there happens to be no decision upon these particular words. This is a gift of money to be applied "in supporting or founding free or ragged schools for gutter children or for the poorest of the poor" in a particular parish. The contention on one side is that the words "supporting or founding" are not to be read literally, but as "supporting and founding." I see no reason for adopting that contention. The fair reading of the words is the literal one; it is an alternative trust. we have the fact that the testator had for some years before the date of his will supported a school, and that this school was held in a room in Barnes hired for the purpose. testator was the principal subscriber to the school; he paid the rent of the room, and the teacher's salary; that was his position as regards the school at the dates of his will, of his codicil, and of his death.

There was then a school actually existing at Barnes which he himself supported; and, therefore, considering how he himself stood as regards this particular school, and the fact

(6) 11 Hare, 1.

(\*) Law Rep., 10 Eq., 246. (\*) 7 Ch. D., 204; 23 Eng. R., 521. (\*) 30 Beav., 335.

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(1) 15 Sim., 146
<sup>2</sup>) 16 Beav., 295.
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<sup>(</sup>²) 1 Drew., 28.

<sup>(4) 9</sup> Hare, 647. (3) Law Rep., 12 Eq., 544. 25 Eng Rep.

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that he was its principal supporter, I think the words are

Now what does the word "support" mean? Does it imply a direction that the money shall, in the words of the statute (9 Geo. 2, c. 36), be "laid out or disposed of in the purchase of any lands, tenements, or hereditaments? If anybody were to tell me he intended to "support" a particular charity I should not infer that he was going to buy land or build a house for the purpose. There is no reason for assuming that the word has any such meaning. It does not convey to one's mind the notion of building or of buying In order to hold that a trust to "support" a charity is obnoxious to the statute, I must consider it as a trust to "purchase lands, tenements, or hereditaments." opinion it has no such meaning.

Reading, then, the words of the gift literally, they do not necessarily or primarily imply the purchase of land or a house, and, therefore, I hold this to be a good charitable

gift.

Solicitors: W. M. Shirreff; Hare & Fell.

[8 Chancery Division, 160.] V.C.M., Feb. 4, 1878.

# [160] \*Banco de Lima v. Anglo-Peruvian Bank. [1875 L. 128.]

Bankers—Credit Agency—Remittances to cover Advances—Appropriation—Discounting expected Remittances—Agents—Constructive Notice,

The plaintiffs, bankers at Lima, established a credit agency with the General Company in London, and agreed to send remittances within ninety days to cover drafts. The General Company, being in difficulties, obtained an advance of money from the Peruvian Bank, to be repaid out of expected remittances from the Lima Bank to cover bills then current, and the Peruvian Bank employed as agents to receive and select from the expected securities, the managing director of the General Company and their own managing director, who had been, two years previously, the manager of the General Company, and was cognizant of and party to the arrangement with the Lima Bank. The securities were selected by and handed over to the Peruvian Bank upon their arrival, and the following day the General Company stopped payment and was wound up:

Held, that the Lima Bank had no title to recover the securities from the Peruvian

This was a bill filed by the Bank of Lima, claiming to recover from the Anglo-Peruvian Bank the sum of £1,000, the produce of a bill of exchange, and £8,000, the proceeds of a box of gold eagles.

In the year 1871 the plaintiffs, the Banco de Lima, carrying on the business of bankers in the city of Lima, entered Banco de Lima v. Anglo-Peruvian Bank.

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into a correspondence with an agent of the General South American Company, carrying on business in London, for the purpose of establishing an agency upon whom they could draw bills, and the correspondence resulted in an arrangement comprised in the following letter dated the 11th of April, 1871, written by the managing directors of the bank to Mr. Chavez, the agent of the General Company:—

"Dear Sir,—We have perused the basis which you have been pleased to lay down for opening a credit to the Bank of Lima, and take the liberty to submit a project of agreement on this subject, so as to know if the same is in conformity with the construction which we have placed on the

said basis, and if it meets with your approval:

"Art. 1st. The total amount of the credit to be £100,000, to be \*disposed of totally or in part, as may be con- [161 venient to the bank, by means of drafts on London at ninety days' sight on the General South American Company, Limited.

"Art. 2d. Immediately upon the bank issuing the first draft, it will pay to the General South American Company one-half per cent. commission for opening the credit on the total sum of £100,000; that is to say, five hundred pounds sterling for the amount thereof; and the said payment of commission, it is understood, is to be once for all.

"Art. 3d. It will also pay to the said South American Company a commission of three-quarter per cent. for acceptance and payment of bills on the amount of drafts issued by the

Bank of Lima on the said company.

"Art. 4th. The Bank of Lima shall allow to the South American Company interest at 5 per cent. per annum, or 1 per cent. more than the rate of the Bank of England, when

the same shall exceed 5 per cent. per annum.

"Art. 5th. The Bank of Lima is under the strict obligation to cover its drafts within the ninety days following the dates of the acceptances in London, other bills at ninety days' sight not drawn on the same General South American Company.

"Art. 6th. The credit of £100,000 shall always be open to the Bank of Lima as long as the said bank shall reimburse the General South American Company the sums for which

it may have drawn against it.

"Art. 7th. The bills to be drawn by the Bank of Lima on the General South American Company must unavoidably be signed by one of the two managers who sign these presents, placing before the said signature the following words: For the Bank of Lima—The Managing Director. This letter was submitted by Mr. Chavez to the General Company, who in a letter to their agents dated the 16th of May, 1871, accepted the terms therein specified, but recommended him to tell the managers of the Banco de Lima that they would as a general rule have to cover their drafts seventy-five days after their respective dates. The following letter was also addressed to the Banco de Lima, and signed by the managers, Thomas Wheelock and A. de Gessler:—"Mr. Chavez, our agent in your city, has communi-162] cated \*to us the basis on which he has opened in the name of this company a credit to the bank so worthily managed by you, for £100,000. We are glad to inform you that this credit has been confirmed by the board of this company."

In the month of August, 1871, the Bank of Lima commenced to draw upon the General Company under the agreement for a credit, and business continued to be conducted between the plaintiffs and the company upon the footing of that arrangement down to the beginning of 1875, when the events which gave rise to this suit occurred. About this time the General Company were in difficulties, and in February, 1875, a sum of £30,000 was borrowed by the General Company from the Anglo-Peruvian Bank, which sum was

repaid before the end of the month.

On the 13th of February, 1875, the Bank of Lima despatched to the General Company a letter inclosing bills of exchange to the amount of £5,000; and on the same day the plaintiff bank despatched 2,000 American gold eagles for the same purpose, the bill of lading for the gold being posted on the same day as the letter. One of the bills forming part of the £5,000 despatched on the 13th of February was a bill for £1,000 on Dreyfus Brothers & Co., and it was the proceeds of that bill for £1,000 and the proceeds of the gold which the plaintiffs now sought to recover from the Anglo-Peruvian Bank.

On the 1st of March, 1875, the state of the credit between the plaintiff bank and the General Company was this: The General Company had in their hands a sum of £27,450 17s. 9d. balance in favor of the Bank of Lima, and on the 3d of March, when other drafts of the plaintiff bank matured and were paid, the General Company still had a balance in their hands in favor of the plaintiff bank of about

£20,000.

On the 3d of March, 1875, the General Company, at a meeting at which was present, amongst other persons, Mr. Schwank, as one of the managing directors, passed a reso-

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lution, in accordance with which a letter bearing the seal of the company was sent to the Anglo Peruvian Bank, which

was to the following effect:— "This company is in expectation of receiving certain bills or remittances by the West Indian mail, which is due on or about the 16th instant, from the parties set out in the list sent herewith, and \*is in immediate want of funds. This is to request you to provide the company with funds by discounting the said remittances before receipt of the same, and for that purpose to open a credit to the amount of £30,000 until the 17th instant in favor of the company, to be made available by checks of the company. The bills so drawn will be paid to and received by the company by way of discount in advance of the said bills, and the bills will be delivered to you or your nominees as they arrive, duly indorsed over to your bank in blank, and, if you require it, the company at their expense will procure the same to be Your bank is to charge, and the company will discounted. pay, a commission of 1 per cent. and interest at 5 per cent. per annum on the said sum of £30,000, together with all brokerage discounts and other expenses and charges, and the company hereby guarantees to you that the said remittances, to an amount sufficient to pay you under the said credit, will arrive before the 17th instant; and if they do not, or are insufficient, the company will pay to you all moneys paid by you under the said credit, together with the above-named commission, interest, and expenses."

This letter was accompanied by the list of expected remittances therein referred to, and among the items in this list the £16,000 expected from the plaintiffs' bank was in-

cluded.

The Anglo-Peruvian Bank acceded to the request contained in the General Company's letter of the 3d of March, 1875, by a letter of the same date, signed by A. de Gessler, managing director, in which was contained the following passage: "We beg to nominate Messrs. Napoleon Canevaro and A. Schwank as the gentlemen on our behalf to whom you are to deliver the remittances and bills you mention in your letter as soon as received."

As an additional security to the Anglo-Peruvian Bank, there was a letter of guarantee given by a Mr. de Lazzarraga, that a certain sum of £24,570 comprised in the list sent by the Bank of Lima and drawn upon the Banco del Ecuador Guayaquil would be duly paid by that bank.

Guayaquil would be duly paid by that bank.

The General Company then proceeded to draw upon the Anglo-Peruvian Bank, on dates between the 3d and 5th of

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March, both inclusive, for sums closely approaching to the £30,000, the full amount of the credit. On the 16th of March the General Company \*received the remittances from the plaintiff bank despatched from Lima on the 13th of February, consisting, amongst other securities, of 2,000 American gold eagles and £5,000 of bills, including the £1,000 bill on Dreyfus Brothers & Co. On the same 16th of March Mr. Schwank wrote to the Anglo-Peruvian Bank a letter in which he inclosed and handed to them, among other securities, the bill of lading for the 2,000 gold eagles and the £1,000 bill on Dreyfus & Co. The following day—the 17th of March—the 2,000 gold eagles were delivered to the Anglo-Peruvian Bank, and were by them sold (through the agency of Messrs. Mocatta & Goldsmid), and realized £8,074 7s. 1d. The account current between the Anglo-Peruvian Bank and the General Company was then settled by the bank handing to the company a check for £534 18s. 4d., the balance in favor of the General Company, and at the same time Mr. de Lazzarraga was released from the guarantee he had given as before stated.

On the same 17th of March the General Company suspended payment, and on the next day the petition was presented, upon which the General Company was ordered to be

wound up under supervision.

Upon going into liquidation, it was discovered that of the balance of £31,842 8s. 10d. which the General Company held on the 17th of March for covering the remittances of the plaintiff bank, they had no more than £4,000 of bills in hand.

Glasse, Q.C., and Kekewich, Q.C., for the plaintiffs: First, we say that the bill and the gold were sent to this country to be applied for a specific purpose, namely, to They never in fact became the property of meet the bills. the General Company, nor did they come into their possession, because they were received by the agents of the Peruvian Bank and diverted from their proper course and from their original destination. This was an improper and unfair mode of dealing, and contrary to mercantile usage.

Secondly, we say that notice to the Anglo-Peruvian Bank is clearly proved from the fact of Mr. Schwank and Mr. de Gessler being employed as their agents. Therefore they could only take such title as the General Company could

confer, which was a qualified title.

\*J. Pearson, Q.C., and Speed, for the Anglo-Peru-The arrangement was for the Bank of Lima to vian Bank: send remittances in sufficient time to cover the acceptances of the General Company, but these remittances were not supBanco de Lima v. Anglo-Peruvian Bank.

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posed to be an exact cover for each special advance. The acceptances were of various amounts, and so were the remittances, but in the running account between the two parties it would have been impossible to have sent a remittance for each acceptance; the amount of bills or other remittances received from the Lima Bank would, in the usual course of business, be carried to the general credit of the account. No particular bill or other remittance would be appropriated to any particular acceptance that had been given by the General Company. Whatever complaints the Bank of Lima may have against the General Company, they can have none against the Anglo-Peruvian Bank, who took these remittances which the General Company had a right to discount.

There is nothing to affect us with notice: Worsley v. Earl of Scarborough (1). Notice to Schwank was no notice to us, and this brings it within the cases of Kennedy v. Green (1); Ex parte Oriental Commercial Bank (\*): Waldy v. Gray (\*) Perry v. Holl (\*). The right of property in the gold as well as in the bill passed to the General Company: Coventry v.

Gladstone (\*); Shepherd v. Harrison (').

Romer, and T. P. Price, for the General South American Company, claimed no interest in the bill of exchange or the gold, but submitted that they were entitled to discount the bill, and to deal with the gold in any way they thought fit, and that they acted bona fide in all their transactions with the Lima Bank.

Glasse, in reply.

Malins, V.C.: I should have been glad if this question could have been submitted to the proper tribunal for deciding a case as to the rights \*arising out of a mercantile [166] transaction, namely, a jury of merchants sitting at Guildhall, but as it arises out of a winding up business it falls

upon me to decide it.

The transactions, as admitted on both sides, are these: The General South American Company was established in the city of London in the year 1868, and was in very high credit and in good repute in the year 1871. The Bank of Lima were desirous of establishing an agency in London upon whom they could draw as a matter of convenience; a correspondence was carried on between the Bank of Lima and the General Company, the result of which was that the Bank of Lima was to be at liberty to draw upon the General

<sup>(5) 2</sup> D. F. & J., 38. (6) Law Rep., 4 Eq., 498. (7) Law Rep., 5 H. L., 116. (1) 3 Atk., 892. (2) 3 My. & K., 699. (2) Law Rep., 5 Ch., 858. 4) Law Rep., 20 Eq., 238; 18 Eng. R., 759.

Company to the extent of £100,000. Of course the General Company were to be protected against liability under this arrangement; and the stipulation upon that subject is the

5th article in the letter of the 11th of April, 1871.

This arrangement, which was confirmed by the General Company, seems to have gone on with perfect satisfaction to both parties from 1871 to the month of March, 1875, when the transaction, the effect of which I am now called upon to decide, took place. It seems that the Bank of Lima, at their will and pleasure, did draw upon the General Company for £100,000; and it is clear that the Bank of Lima faithfully performed their part of the contract of covering their liabilities with bills in pursuance of this article of the contract. In the spring of 1875 it seems that the General Company were somewhat in difficulties; for it is stated that in the month of February of that year a sum of £30,000 was borrowed by the General Company of the Anglo-Peruvian Bank, which sum was repaid before the end of the month, that is, within fourteen days. I think the circumstance of such a company borrowing is an indication that things were not going on quite well, for a company like this, with a very large capital, should not require to borrow at all: but they were borrowers, and they repaid their loan. That the General Company, therefore, were struggling with difficulties in the spring of 1875 can admit of no doubt.

Now the course of dealing, as I have stated, having gone on for a period of four years between the Bank of Lima and their agents in London, the General Company, the Bank of Lima had advised that they had forwarded a box of gold 1671 and had also sent certain \*bills of exchange. That advice had not been received in London on the 3d of March. but, according to the usual course of dealing between the parties, the General Company expected, and I suppose casonably expected, that on or before the 17th of March they should receive remittances not only from the Bank of Lima, but remittances to a very large amount from other quarters, which would enable them to meet all their engagements. A list of them is given to the Anglo-Peruvian Bank, amounting to £99,310, but, being temporarily pressed, and having had transactions with the Anglo-Peruvian Bank before, on the 3d of March, 1875, in pursuance of a resolution which they had themselves passed, the General Company addressed to the Anglo-Peruvian Bank the letter of the 3d of March, 1871, which is the foundation of the whole transaction, and which was in these terms:—"This company is in expectation of receiving certain bills or remittances by the Banco de Lima v. Anglo-Peruvian Bank.

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West Indian mail, which is due on or about the 16th instant, from the parties set out in the list sent herewith, and others, and is in immediate want of funds. This is to request you to provide the company with funds by discounting the said remittances before receipt of the same, and for that purpose to open a credit to the amount of £30,000 until the 17th instant in favor of the company, to be made available by checks of the company. The amount so paid will be paid to and received by the company by way of discount in advance on the said bills, and the bills will be delivered to you or your nominees as they arrive, duly indorsed over to your bank in full; and if you require it, the company, at their expense, will procure the same to be discounted." Then it sets out the rate of charges.

With the letter there was sent a list which stated: "Banco del Ecuador Guayaguil, £24,570 6s. 10d."—that is, they expect to receive that amount from them. "Banco de Lima-Lima, £16,000"—that is, without specifying any particular bills, which they could not do, or any particular mode of remittance, but generally that they expect to receive that sum from the Bank of Lima on or before the 17th, in the usual course of post. They knew very well when the mail would arrive; I suppose the proper day for arrival is the 16th, and therefore they said, on or about the 16th "we expect to receive from the Bank of Lima £16,000." \*The Anglo Peruvian Bank acceded to [168] the request for making the advance of £30,000, and they relied upon the remittances which were promised; and therefore they wrote: "In reply to your application of this date for an advance, we beg to say that we are willing to make the same on the conditions specified. We beg to nominate Messrs. Napoleon Canevaro and A. Schwank as the gentlemen on our behalf to whom you are to deliver the remittances and bills you mention in your letter as soon as received."

Now that applies not merely to the £16,000 expected from the Bank of Lima, but the £24,000 from the Banco del Ecuador Guayaquil, and all the others which are enumerated here, amounting to £99,310. So that Mr. Schwank and Mr. Canevaro are not appointed merely to receive remittances from the Bank of Lima, but all the others which are mentioned in that letter. Thereupon the Anglo-Peruvian Bank having acceded to the request to make the advance, sent a check-book which the General Company could use; and in pursuance of that letter the General Company drew

25 Eng. Rep. 26

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upon them the next day for £22,000, and in a very few days the whole of the £30,000 was drawn out of the Anglo-Peruvian Bank, and also within a very few days they began paying back again. There is a sum of between £2,000 and £3,000 paid back on account of the £30,000, certainly within

five days.

The transaction went on, and the 16th of March arrived, and on the morning of that day the General Company received by post, amongst other things, a bill drawn on Dreyfus & Co. of Paris for £1,000. They also received by the same post a bill of lading for a box of 2,000 gold eagles, which it turns out were sold for the sum of £8,000, or rather more. Therefore the property they received on the 16th, which is the only thing I have to deal with, is this bill of Dreyfus for £1,000 and 2,000 gold eagles, which were valued at between

£8,000 and £9,000.

Now the General Company had had the £30,000 between the 3d and the 16th. It had all been drawn when these securities arrived. The General Company was still carrying It is not pretended that they stopped payon its business. ment or closed their doors before the 17th. There seems to be some uncertainty whether they opened their doors on the 17th or not; but certain it is that on the 17th, either by not 169] opening their doors \*in the morning, or by closing them in the course of the day, they did stop payment. the 16th of March, the bill of exchange in question having been received, and the bill of lading of the gold having been received, Mr. Schwank, it appears, waited upon the Anglo-Peruvian Bank and said he had received these remittances and many others, and, as it were, he held out his hand and said, "We owe you £30,000: which of these securities will you select to reimburse you?" There were other bills received by the General Company besides Dreyfus's bill for £1,000, and therefore it seems, as far as this Bank of Lima is concerned, the property was selected by Mr. de Gessler (which is one of the great points I have to advert to afterwards), who had originally been one of the managers of the General Company and who ceased to be so about two years before this transaction took place, and had now become the general manager of the Anglo-Peruvian Bank. Mr. Schwank, therefore, acting as trustee in pursuance of the resolution of the 3d, came to Mr. de Gessler, and Mr. de Gessler selected Dreyfus's bill and the bill of lading for the gold. Accordingly, on the morning of the 16th, it was handed over to the Anglo-Peruvian Bank, that is, to their managing director, Mr. de Gessler, who is the same as the bank, and therefore

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there were handed over to the bank the bar of lading for

the gold and Dreyfus's bill for £1,000.

Something was said by Mr. Glasse as to Dreyfus's bill not being accepted. I do not think that makes any difference; because I believe it is quite consonant with mercantile usage to sell a bill which has not been accepted, and which is readily marketable when the drawer or indorser is a good man. In the present case, the Bank of Lima being well known, and in high credit no doubt, and Dreyfus being well known, and having a very large house in Paris, they knew that the Bank of Lima would not send a bill which Dreyfus would not accept; and, even if Dreyfus did refuse acceptance, they had the indorsement of the Bank of Lima, and they had also the liability of the drawer whoever he was. Therefore, that such a bill should be the subject of dealing in the mercantile world does not in the slightest degree deviate in any point from ordinary usage. They

selected the bill and the gold.

Now, apart from the question which Mr. Glasse and Mr. Kekewich have argued as to notice, what was this transac-The Bank of \*Lima had selected the General [170] Company as their agents, and they had unbounded confi-The question I have to decide is not whether dence in them. the General Company were justified in doing what they did. If I had to decide that, I should probably decide that they were not justified; for I am quite satisfied that they would not have adopted the course they did unless they had been under pressure. They were under pressure we know. know very well from experience that mercantile houses, under pressure, will do things which they would not otherwise That the General Company, therefore, were very much under pressure at this time, and that they deviated from the general course of dealing by discounting the bills before they were received, I think would admit of no doubt, and I should have very little hesitation in deciding that the General Company were wrong in what they did. But I repeat, the question I have to decide is this, not whether the General Company were wrong, but whether the transaction is one that deprived the Anglo-Peruvian Bank, who paid value for this property in anticipation of its arrival, of the right to the proceeds of the property when it did arrive. That, I think, is the only question I have to decide with regard to the transaction.

First, then, with regard to the question of the bill, nobody can possibly dispute that if the money had been obtained on the 16th the General Company were in a situation to deal

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with Drevfus's bill on that day, and if they had handed it over to the Anglo-Peruvian Bank in consideration of the price of the bill then paid, nobody can doubt for a moment that the Anglo-Peruvian Bank would have acquired a good title to it. So, with regard to the gold, cases were cited to me; but the law is now perfectly settled that a bill of lading is an indication of property, and delivery of a bill of lading for value passes the property unless it is obtained by fraud or in any improper manner, for then the property does not pass; and it was so laid down in Shepherd v. Harrison (1), in the House of Lords, and the case cited before me, in which, a short time ago, I had occasion to decide. in accordance with the decision in the House of Lords, that where a bill of lading of some timber from Sweden was received by a house in London, and a bill was sent for ac-171] ceptance at Hull, and the Hull merchant \*thought fit to retain the bill of lading, but refused to accept the bill, I decided there, having the decision of the House of Lords for my guide, that when a bill of lading and acceptance to cover the value are sent, and the person to whom they are sent refuses to accept, he cannot retain the bill of lading. The House of Lords decided, under precisely similar circumstances, where a bill of lading was retained and the bill was refused, that although generally possession of the bill of lading passes the property, yet, if it is improperly obtained, the property does not pass. Therefore it was decided in that case that Shepherd & Co., having refused to accept the bill, did not by the retention of the bill of lading acquire any property. That is very distinctly laid down by all the noble and learned Lords who decided that case, and particularly in the latter part of Lord Cairns' judgment. general proposition that a bill of lading passes the property has been long settled. One of the cases cited on the present occasion on that subject is Coventry v. Gladstone (1), where that doctrine is expressly laid down. Therefore the bill of lading represents the property, and has precisely the same effect, I apprehend, as if, instead of its being a large box containing 2,000 American eagles, which must have been of very great weight, it had been a box containing a diamond worth as much money, which had been placed in the hands of Mr. de Gessler. The bill of lading, therefore, passes the property to the Anglo-Peruvian Bank, unless it was improperly obtained.

Now, was it improperly obtained? This is a case of principal and agent. The Bank of Lima are the principals and

<sup>(1)</sup> Law Rep., 5 H. L., 116.

<sup>(\*)</sup> Law Rep., 4 Eq., 493.

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the General Company are the agents. If one firm, the Bank of Lima, will place unbounded confidence in their agents, as I think they were warranted in doing in this case, will trust them with their bills, will trust them with their gold, there ought to be the very strongest case to deprive those who deal with agents, of the property which they acquire in the

course of such dealing.

Now, apart from the question of Mr. de Gessler having been connected with the General Company, was there anything in this transaction which could deprive the Anglo-Peruvian Bank of the right to this property which they bought of the General Company \*when it arrived? [172] It is perfectly clear by the law of this court, that property in expectancy can be the subject of bargain and sale, and mercantile dealing, or anything else, just as much as property in possession; and apart from the particular circumstances of this case, here is one mercantile firm who says to another, "We are under pressure and shall be so until the 17th inst.;" they write that on the 3d—that is fourteen days-"We shall be under pressure. We shall have certain property coming to us not later than the 17th, and if you will let us have £30,000, the property which we shall then have we will hand over to you." Is there anything improper in such a course of business? There is nothing unfair and nothing dishonest; it is perfectly according to mercantile usage and according to trade that those who expect property and have not got it in possession may make it the subject of a money arrangement. In the transaction itself, therefore, there was nothing improper on the part of the Anglo-Peruvian Bank, who do not seem to me to have deviated from propriety and mercantile dealing in this trans-There happened to be among the directors of the General Company a gentleman of the name of Lazzarraga, a very wealthy man, it is said, residing in Paris. In order to make themselves doubly sure they take from him a guarantee that the £24,510 from the Banco del Ecuador Guayaquil shall be forthcoming, and so far as the same is not forthcoming he shall make it good. The £24,510, it seems, did come—at all events the debt to the Anglo-Peruvian Bank was paid, and Mr. Lazzarraga was at once released.

Now, therefore, if the gold had been the absolute property of the General Company, and the bill of exchange the same, their receiving the price of it in anticipation before it arrived was perfectly regular, and the property would go to the Anglo-Peruvian Bank.

Then, were the Anglo-Peruvian Bank justified in treating the General Company as the owners of this property? If the General Company were the owners, the question cannot There is nothing to discuss, admit of the slightest doubt. because if they had been the owners of the property, there was no objection to their pledging their property before it It is the right of every man to do so. It would be arrived. 1731 a grievous hardship if a man \*who had a large property coming to him in fourteen days must dishonor his paper because he cannot get an advance before the fourteen Therefore if the General Company are to be treated as the owners of the property which they expected to receive from the Bank of Lima on or before the 17th, there is an end to all question between the parties. Now, if it were a question between the Bank of Lima and the General Company, undoubtedly the General Company were not the absolute They had only the qualified ownership. they the property? I suggested to the learned counsel the question where was the property in this gold and in the bill between the 3d and the 16th. I was rather under the impression at one time, until I further considered it, that the property would remain in the Bank of Lima. But considering the course of dealing, I am of opinion it must be considered that when the bill of lading was posted at Lima it became the property of the assignees. The property in a shipment becomes the property of the consignees when the shipping takes place and the bill of lading is forwarded. Therefore, as this gold was shipped, and the bill of lading was forwarded to the General Company for that which I must consider value, namely, the course of dealing between the parties to protect them from a liability they had incurred for the Bank of Lima, as between the Bank of Lima and the General Company, I must consider for this purpose that the bill of exchange, and also the gold by the transmission of the bill of lading, was the property of the General Com-The General Company undoubtedly ought not to have dealt with the property except as covering the remittances; therefore it becomes very material to decide what was the state of the accounts between the General Company and the Bank of Lima on the 3d of March. It appears from the evidence that on the 3d of March the General Company had in hand from the Bank of Lima a balance of rather more than £20,000, and I must take that to be £20,000 in money, because, considering they were under pressure, there can be no doubt that every available bill had been discounted,

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Therefore they everything had been turned into money. had in hand in cash upwards of £20,000. On the 16th they received bills to the amount of £5,000, that is, Dreyfus's bill for £1,000 and bills for £4,000 besides, and gold eagles to That brought the balance on [174 the extent \*of £8,000. the 16th up to £33,000. Therefore, having £33,000 belonging to the Bank of Lima in hand, it could not have been right in the General Company, in my opinion, on the 16th to sell the golden eagles and pay a debt having no connection with the Bank of Lima. But it must not be lost sight of that although they had in hand a balance of £33,000 on the 16th, they were liable upon bills for nearly £28,000 falling due on the 18th, so that in two days the balance, if they had gone on, of £33,000, would have been reduced to a balance of £5,000. So, considering that they were liable to pay that, the balance was not so overwhelming in favor of the Bank of Lima as to render it improper for them to deal with the property generally.

It appears to me that as between the Bank of Lima and the General Company the effect of the contract of April, 1871, acted upon for four years, was to make all the bills remitted to the General Company, as between those two parties, the absolute property of the General Company for the purpose of dealing with them as they thought fit; and if anything was done wrong, it is one of those cases in which the wrongful act of the agent must fall upon the principal

who has authorized him to act.

I have already stated that in my judgment there was nothing wrong in the transaction itself on the part of the Anglo-Peruvian Bank; therefore the difficulty is endeavored to be got over by the doctrine of notice. Mr. Glasse and Mr. Kekewich have strenuously contended that there was in this case notice to the Anglo-Peruvian Bank which deprives them of the right to hold this property, and they endeavor to make out notice; thus, Mr. de Gessler and Mr. Wheelock were originally the managers of the General Company, and they were the managers when this arrangement of April, 1871, was entered into, and Mr. de Gessler is one of the agents who signed the document and made that arrange-Mr. de Gessler continued to be the general manager, or one of the general managers, from 1871 to 1873, when he ceased to be the manager of the General Company and became the manager of the Anglo-Peruvian Bank, and it was through him that this arrangement was made in 1875. Now, it is contended that, inasmuch as Mr. de Gessler knew of

the arrangement of 1871, although he had ceased to be the manager of the General Company for two years, \*he was bound to bear in mind what that arrangement was, and to remember everything about it; and not only that, but to go into the question of the general account between the Bank of Lima and their agents, the General Company. think myself that would be carrying the doctrine of notice to a very dangerous extent. It was said by the Lord Chancellor in Ware v. Lord Egremont ('): "I must not part with this case without expressing my entire concurrence in what has on many occasions of late years fallen from judges of great eminence on the subject of constructive notice, namely, that it is highly inexpedient for courts of equity to extend the doctrine—to attempt to apply it to cases to which it has not hitherto been held applicable." I think if I were to say that where a gentleman who had been manager of one company for three years after a transaction had taken place, and had then ceased to be so for two years, and became the agent of another company, the other company to which he became the agent is bound by all the knowledge that he once possessed, and that he, as their agent, was bound to recollect all the minute arrangements of the documents which he is not in possession of and which are not accessible to him; and also to go into the general account between principal and agent arising out of this transaction, it would, in my opinion, be carrying the doctrine of notice to a most inconvenient and dangerous extent. It has often been said, and the celebrated decision of Lord Hardwicke was referred to as to the doctrine of notice, that it must be not at a distant period, but in the same transaction. We cannot expect a person to remember the minute effect of transactions long ago.

Mr. Glasse said, although Mr. de Gessler did not remember and did not know this, he ought to have made inquiry. What inquiry ought he to have made i Was he called upon to go to the agent of the General Company and say, "What is the state of account between you and the Bank of Lima?" It seems to me that there was no such obligation imposed upon him. This company was a flourishing company, as I understand, and in high credit. It does not seem to me that it was so much deviating from the ordinary course of business in seeking an advance of money from the 3d of March to extend over fourteen days, as that the Anglo-Peru-1761 vian Bank, \*by themselves or their agents, were

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called upon to make any inquiry as to the state of accounts between the Bank of Lima and their agents, the General Com-I cannot, therefore, think that the doctrine of notice (and I believe it rests upon Mr. de Gessler's notice only) can be extended to this case.

Upon the whole, therefore, I come to the conclusion that the transaction was not irregular, and was not improper. am only now speaking of the question as between the Bank of Lima and the Anglo-Peruvian Bank. I must say it was irregular and improper as between the Bank of Lima and the General Company. It was wrong. I think they ought not to have dealt with the property as they did. But as between the persons who deal with the General Company, I think it is one of those cases in which confidence has to a certain extent been betrayed, but it has not been betrayed under such circumstances as to call upon those who are dealing with the General Company to make any inquiry. Therefore I am of opinion that by paying the price in advance—because it is not denied that they paid the price of the gold and they paid the price of the bill—all that can be said is that they paid it in advance; they paid it on or before the 16th; by paying the price of the gold they would be entitled to the bill of lading, and by paying the price of the bill they would be entitled to all. I have given great consideration to the case, but I am unable to satisfy myself that there is any ground upon which I can come to the conclusion that that was such an irregularity as put the Anglo-Peruvian Bank upon any inquiry whatever, and I cannot impute to that bank any knowledge which Mr. de Gessler had at a former period.

I am of opinion, on the whole, that the case of the plain-I am of opinion that by delivery of the bill of lading on the 16th, and by delivery of the bill of exchange, a good title was acquired by the Anglo-Peruvian Bank; therefore the case of the plaintiff impugning their title fails; the consequence of which is that the bill must be dismissed.

I am glad to find that this question will not be very important to the Bank of Lima, because I am told by the official liquidator that they have already received 7s. in the pound, and there is a further dividend of 2s. in hand for Besides which Mr. Cape \*says that there is every prospect of all the debts of the General Company being paid in full. What I propose to do is to dismiss the bill with costs as between the Bank of Lima and the Anglo-Peruvian Bank, but without costs as against the General

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Company, because I think they have been guilty of impropriety. The costs of the General Company will be costs in the liquidation.

Solicitors: Freshfields & Williams; Norton, Rose & Co.

[8 Chancery Division, 177.]

V.C.M., Feb. 26, 27; April 10, 1878.

CHATTOCK V. MULLER.

[1876 C. 406.]

Agreement-Uncertainty-Agency.

The defendant purchased an estate, having agreed with the plaintiff that, if he made the purchase, he would cede part thereof to the plaintiff.

There was some uncertainty in the memorandum of agreement between the plaintiff and defendant as to the exact portion which was to be ceded to the plaintiff,

In an action by the plaintiff for specific performance of the agreement,

The court directed a reference to chambers to ascertain what portion the plaintiff
was entitled to, and decreed that the defendant should convey such portion to the
plaintiff.

In June, 1876, an estate called the Kitswell estate, in Hertfordshire, was offered for sale by auction, in two lots, con-

sisting of 129 acres and 63 acres respectively.

The defendant, whose estate immediately adjoined the property, made the acquaintance of the plaintiff a few days before the sale, and having heard that the plaintiff was intending to purchase the property, and was willing to give £23,000 for it, said he could get it much cheaper, and invited him to come to his house, as he himself desired to purchase the part of the property which touched upon his own estate.

Accordingly, on the 20th of June, the plaintiff went to the defendant's house, and the plaintiff produced a written statement of the part of the property which he desired to have, being the house and about eighty acres which were on his side of a brook running through the Kitswell estate; and a memorandum was drawn up by the defendant in his own 178] handwriting, by which it \*was agreed that if the defendant purchased the whole estate, or lot 1, he would cede to the plaintiff certain fields which were there specified, and also "lot 13, that part of the lower park and plantation bounded on the south by lot 19, and on the north by the brook, containing about twenty acres—the acreage of lot 13 to be ascertained." And by the same memorandum the mode of ascertaining the price to be paid by the plaintiff for the part ceded to him was arranged.

The defendant marked with a pencil on the plan the

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boundary of the part which he wished to have, but it was not then settled who was to bid at the auction.

A few days later it was arranged between the plaintiff and the defendant that the defendant should bid at the sale and

the plaintiff should not.

The defendant stated that the final agreement was that if he purchased lot 1 only he should cede part to the plaintiff, but if he purchased the whole he should deal with the estate as he pleased. The court did not consider that this stipulation was proved to have been made.

At the auction on the 27th of June, the property was bought in at the reserve price, the highest bid being £19,500.

It was proved that the plaintiff and defendant met soon afterwards, and the plaintiff said, "I suppose our arrangement will hold," and the defendant said, "Certainly, but we must lie by, for the owner will come to us."

The evidence showed, in the opinion of the court, that an arrangement was then come to that the defendant should buy the property if he could by private contract, and that in that case the plaintiff should have the mansion house and

the eighty or ninety acres he wanted.

On the 3d of July the defendant wrote to the plaintiff: "As this estate was not sold at the auction and is now to be sold in one or two lots, I propose to make an offer unless I hear from you in a post or two." And on the 4th of July the defendant wrote to the plaintiff to say that he had had an offer from the auctioneer, and that the terms had been lowered; he added, "I have held off more in your interest than in mine, but you are of course quite at liberty to offer for the property."

\*Thereupon the plaintiff wrote to the defendant to [179 say that after the defendant's letter he would not think of making a bid, or interfering in any way, and asked that he might hear from the defendant when he had anything to say.

On the 14th of July the defendant concluded a treaty to buy the property for £19,500, and wrote the next day to the plaintiff, "I closed the purchase of Kitwells and signed the agreement yesterday."

And this letter was answered by the plaintiff expressing his approval of the terms, and adding, "I will meet you at any time you like to arrange for my purchase from you."

On the 20th of July the defendant wrote to the plaintiff to say he had not made up his mind as to Kitwells, but would write as soon as he decided on dividing the estate for the purpose of sale, to which the plaintiff answered, offering to save the defendant all trouble as to dividing the estate, and Chattock v. Muller.

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to take over the whole purchase except the forty-seven acres next the defendant's estate.

On the 25th of July the defendant wrote to say he had made up his mind not to sell any part of the estate, but intended to keep it for his son, and added, "In my agreement with you I reserved to myself the right to deal with the property as I liked in case I purchased the whole."

The plaintiff was examined viva voce and was not cross-examined, and no evidence was called on the part of the

defendant.

Higgins, Q.C., and Whitehorne, for the plaintiff: This case comes distinctly within the authority of Heard v. Pilley (1); Cave v. Mackenzie (2). By these cases Bartlett v. Pickersgill (2) is overruled. The only difference is that here the defendant was to buy a part of the property for the plaintiff, and not the whole.

[Malins, V.C., mentioned Gregory v. Mighell (') as ap-

portioning the price.

There was a similar agency, though it took the form of a 180] trust \*in Booth v. Turle('); Lees v. Nuttall('). No doubt it is only part of the estate which the defendant holds as trustee for the plaintiff, but "that which can be rendered certain is certain." In his last letter the defendant repudiates the contract, and this is such an acknowledgment of the existence of the contract as to enable the court to enforce it: Bailie v. Sweeting (').

Glasse, Q.C., and Kekewich, Q.C., for the defendant: Assuming that there is agency, the terms of the agency are not defined. The dividing line between the part to be purchased by the defendant for himself and for the plaintiff was not settled. The Statute of Frauds applies, and the agreement is void for uncertainty. For what amount is a decree to be made? Can a person be held to be an agent for another as to an unascertained quantity of an estate?

[Malins, V.C.: It may be that, as the plaintiff has been lulled into false security by the defendant's conduct, the proper relief would be to give the plaintiff the whole estate.]

Higgins, in reply: The defendant was our trustee as to the mansion house and eighty or ninety acres of land, and that is certain which can be rendered certain: Owen v. Thomas (\*); Haywood v. Cope (\*).

(1) Law Rep., 4 Ch., 548.

(\*) 46 L. J. (Ch.), 564. (\*) 1 Cox, 15.

(4) 18 Ves., 328.

(5) Law Rep., 16 Eq., 182.

(\*) 1 Russ. & My., 53; 2 My. & K., 819. (\*) 9 C. B. (N.S.), 843; 30 L. J. (C.P.), 150.

(5) 8 My. & K., 853, 856.

(°) 4 Jur. (N.S.), 227.

At the close of the arguments the Vice-Chancellor intimated his opinion that the defendant had lulled the plaintiff into not making an offer for the estate; that the letter of the 4th of July was conclusive that the defendant was all the time leading the plaintiff to believe that if he bought the property the plaintiff should have the part he wanted. Otherwise he ought to have told the plaintiff not to rely upon him, and that if he wanted any part of the estate he must bid in competition with him; and that having, so to speak, warned the plaintiff off from the purchase, the defendant was, in his opinion, no longer at liberty to change his mind; that there was clearly an arrangement that the defendant \*was to buy the estate so far as he wanted it, for himself, and so far as he did not want it, for the plaintiff; so that if the agreement had been to buy the whole estate for the benefit of the plaintiff, the defendant could not have bought it for himself, he would have been a trustee, and the Statute of Frauds could have had no application even if that defence had been otherwise open. But he reserved his judgment, on the defence that the agreement did not point out accurately the boundary of the portion which was to belong to the plaintiff.

April 10. Malins, V.C., after recapitulating the facts, continued: It is clear that the defendant attended the auction partly on his own account and partly as the plaintiff's agent, and if he had then purchased the estate, he must have been held to be a trustee for the plaintiff of the house and the eighty or ninety acres which it had been arranged that he should have. The subsequent negotiations were treated as carried on by the defendant on behalf of himself and the plaintiff, and he treated the purchase as a joint purchase in various letters until the 25th of July, when he appears to have become enamored with the estate, and astonished the plaintiff by his letter of that date, in which he assumed to be the owner of the estate, part of which he had unquestionably purchased as the agent of the plaintiff. This was a flagrant breach of duty, which in this court has always been considered as a fraud: Lees v. Nuttall ('); Heard v. Pilley ('); Booth v. Turle ('); Cave v. Mackenzie (').

But it was strongly argued by Mr. Glasse and Mr. Kekewich, for the defendant, that the plaintiff cannot have a decree because there was no certainty as to what part of the estate the plaintiff was to have, or as to the price to be paid

<sup>(1) 1</sup> Russ. & My., 53; 2 My. & K., (3) Law Rep., 16 Eq., 182. 819. (4) 46 L. J. (Ch.), 564.

<sup>(\*)</sup> Law Rep., 4 Ch., 548.

In a case like this, where the defendant has acquired the estate or part of it by a fraud on the plaintiff, I think that the court would be bound, if possible, to overcome all technical difficulties in order to defeat the unfair course of dealing of the defendant, and I should not, in my opinion, 182] be going too far if I compelled the defendant to \*give the whole estate to the plaintiff at the price given for it, rather than that he should succeed in retaining it on account of any uncertainty as to the part which the plaintiff is entitled to have. But I think the memorandum in the handwriting of the defendant, which was given to the plaintiff at the interview of the 20th of June, relieves the court in this case from any difficulty. [His Lordship then referred to

the memorandum, and continued:]

This shows every plot of land which the plaintiff desired to have, and which it was agreed he should have, by a reference to particulars on the plan accompanying the conditions of sale, and the only part as to which there is the least uncertainty is the plot No. 13, of which the defendant was to have about twenty acres; but as that part is described by boundaries, there will be no difficulty in ascertaining exactly what the plaintiff is to have, the house and eighty acres of land, which was what he said throughout that he wanted. The same document affords the means of ascertaining the price per acre to be paid by the plaintiff and defendant for what each takes, and if it did not, the case of Gregory v. Mighell(') is an authority to show that in a case like the present the court will do its best to ascertain what the agree-The plaintiff has offered to relieve ment leaves uncertain. the defendant of lot No. 2 at the price which the defendant gave for it, and he must do so if the defendant desires it. There will be a reference to chambers to ascertain the exact boundaries of the part of lot 13 which the defendant is to retain, and the price to be paid by the plaintiff for the part which is to be conveyed to him. The defendant must pay to the plaintiff the costs of the action.

Solicitors for plaintiff: Vallance & Vallance. Solicitors for defendant: Freshfields & Williams.

(1) 18 Ves., 328.

See 23 Eng. R., 118 note. A memorandum of the sale of lands should be so reasonably definite and certain within itself or by other writing referred to, that the contract can be made out as to parties, consideration and subject-matter, without resort to

parol evidence: Johnson v. Granger, 51 Tex., 42; Grafton v. Cummings, 99 U. S. R., 100.

Though invoices and letters from both sides to the other may be read together: McMullen v. Helberg, Law R., 4 Ir., 94.

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## [8 Chancery Division, 183.] V.C.H., Feb. 18, 1878.

\*Ex parte Railway Steel and Plant Company. [183]
In re Taylor.

## In re WILLIAMS.

## 176 76 VVILLIAMS.

Winding-up of Company—Proceedings of Creditor—Judgment and Execution—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 84, 87, and 163—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 87—Judicature Act, 1875, s. 10.

A company was sued in an action under the Bills of Exchange Act, and the plaintiff, in consequence of repeated applications by the secretary and solicitors of the company, postponed proceedings in the action, and ultimately signed judgment and issued execution; a petition for winding up was presented, on which an order was atterwards made; the creditor lodged the writ on the day of presentation of the petition, and om the next day the sheriff seized and was in possession:

Held, that the postponement of the proceedings in the action having been caused by the applications made on behalf of the company for time, the creditor was entitled

to the benefit of his judgment in priority to other creditors:

Held, also, that the right of the execution creditor was not affected by the 10th section of the Judicature Act, 1875.

Form of order.

In an action by another creditor, also under the Bills of Exchange Act, the company obtained leave to appear and defend, on the ground that there had been irregularity in regard to the bill of exchange, and that the plaintiff had not paid the full amount for it. On application for further time to proceed with the defence, statements were made bona fide by the solicitor's clerk as to the solvency of the company and the improbability of a winding-up petition, and further time was given, and ultimately, the orders not having been complied with, the action proceeded. Two days after the presentation of the petition judgment was signed in the action and execution issued:

Held, that the creditor was not entitled to the benefit of his judgment, and that he must come in and prove his claim in the winding-up.

[8 Chancery Division, 198.]

V.C.H., Feb. 28, 1878.

\*Robarts v. Bure.

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[1873 R. 21.]

Administration Suit—Costs—Change of Solicitor—Solicitor's Lien—Set-off.

In an administration suit a decree was made against a defendant, and he was ordered to pay the costs. He changed his solicitor, and subsequently thereto a motion by the plaintiffs for leave to issue an attachment for disobedience to the decree and order was refused with costs:

Held, that the plaintiffs had a right to set off.

THE bill in this cause was filed on the 14th of February, 1873, for the administration of the estate of Elizabeth Buèe, and there was a prayer that the defendant John Chappell might be ordered to deliver up the possession of certain

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premises, and for an account of what had come to his hands, and that he or some of the defendants might be ordered to

pay the costs of the suit.

A decree was made on the 27th of July, 1874, and in the terms of the prayer, and the defendant John Chappell and another defendant were ordered to pay the costs, which, after taxation, amounted to the sum of £277 18s. 3d. By an order of the 18th of February, 1875, the defendant John Chappell was directed to pay other costs, which, after taxation, amounted to the sum of £24 13s. 8d., making a total of £302 11s. 11d.

On the 17th of May, 1877, the plaintiffs moved for leave to issue an attachment against the defendant John Chappell, for not obeying the decree and for not paying the costs, but the motion was dismissed with costs to be paid by the plain-199] tiffs to the \*defendant John Chappell, and those costs, after taxation, amounted to the sum of £32 1s. The solicitor for the defendant John Chappell, on the 11th of February, 1878, gave notice to the solicitor for the plaintiffs that he claimed to have a lien for the costs which had been directed to be paid by the order of the 17th of May, 1877. After the order which was made in February, 1875, and before the motion made in May, 1877, the defendant John Chappell had changed his former for his present solicitor—Mr. J. K. Bartrum.

Boome, for the plaintiffs, now moved that the costs which were in May, 1877, ordered to be paid by them might be directed to be set off against the sum of £302 11s. 11d., after which there would still be a balance due from the defendant John Chappell of £270 10s. 11d. He submitted that the practice was clearly stated in Daniell's Chan. Practice (1); and referred to Cattell v. Simons (2) and Bryon v. Saloon Omnibus Company (2).

Bristowe, Q.C., and Chisholm-Batten, for the defendant, contended that in this case there was no right of set-off. The solicitor's claim to a lien was paramount, and the defendant, to whom the costs of the motion of May, 1877, were ordered

to be paid, was a mere trustee for his solicitor.

They referred to Ex parte Cleland ('), and Mercer v. Graves ('); and also to the statute 23 & 24 Vict. c. 127, s. 28, and asked that the motion should be dismissed with costs.

Boome, in reply, referred to Throckmorton v. Crowley (\*).

<sup>(1) 5</sup>th ed., p. 1269. (2) 6 Beav., 304.

<sup>(8) 4</sup> Drew., 546.

<sup>(4)</sup> Law Rep., 2 Ch., 808.

<sup>(5)</sup> Law Rep., 7 Q. B., 499, 508; 2 Eng. R., 618.

<sup>(6)</sup> Law Rep., 8 Eq., 196.

HALL, V.C.: I am of opinion that the set-off asked for by this motion must be allowed. The distinction taken in the cases seems to me to be this,—that in regard to all costs arising in the same suit or action the right of set-off is sanctioned, and it is impossible to contend successfully that the practice ought to be different, and the costs ought to be dealt with separately, because two or three solicitors \*may [200] have been employed by one or more defendants. This was the view taken by the Master of the Rolls in Cattell v. This was Simons (1). The Master of the Rolls decided the other way in the case of Collett v. Preston (\*), because in that case there were different proceedings—an action at law on a covenant, and a suit in equity—and held that there could not be a set-That is in accordance with sound sense, and the distinction there taken was recognized by Vice-Chancellor Wood in the case of Throckmorton v. Crowley ('), where set-off was allowed in regard to costs arising in the same suit, but not allowed where the costs had arisen in matters which were different. The decision in Mercer v. Graves (') must be considered as in some respects interfering with but not as altering the ordinary rule. There the court distinguished the case of Ex parte Cleland (\*), and commented upon the equitable rule.

The principle is that where a solicitor is employed in a suit or action, he must be considered as having adopted the proceedings from the beginning to the end, and acted for better or worse. His client may obtain costs in some matters in the suit or action, and not in others, and the solicitor takes his chance, and may ultimately enforce his lien for any balance which may appear to be in favor of his client. Therefore, there being a strong authority in the plaintiffs' favor, and no distinct authority against them, I shall adopt the rule laid down, and order that one bill of costs be set off against the other, and I will add, that the order might have

been obtained in chambers.

Solicitors: W. P. Moore; Wedlake & Letts, agents for J. K. Bartrum, Bath.

(1) 6 Beav., 304.

1) 15 Beav., 458. (8) Law Rep., 3 Eq., 196.

(4) Law Rep., 7 Q. B., 499, 508; 2 Eng. R., 618.

(5) Law Rep., 2 Ch., 808.

The general rule in this country seems to be, that on a motion to set off one judgment or claim against another,

ney: Martin v. Kanouse, 17 How. Pr., 146, 9 Abb. Pr., 870 n., 2 Abb., 327, 2 Abb., 330, Id., 390; DeFiganiere v. the court will not, in the exercise Young, 2 Rob., 671; Purchase v. Belof its discretion, grant the motion to lows, 16 Abb., 105, 9 Bosw., 642; Hothe prejudice of the lien of an attorvey v. Rubber Tip, etc., 14 Abb. Pr.,

25 Eng. Rep.

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N.S., 66; Davidson v. Alfaro, 16 Hun, 352, affirmed by Court Appeals, 10 Week. Dig., 56.

See Betts v. Garr, 26 N. Y., 383, re-

versing 1 Hilton, 411.

But in a suit to compel a statutory set-off, the court must grant the relief asked for, notwithstanding the attorney's lien, for the set off is a matter of right: Martin v. Kanouse, 17 How. Pr., 146, 9 Abb. Pr., 370 n.; DeFiganiere v. Young, 2 Rob., 671; Hovey v. Rubber, etc., 14 Abb., N.S., 66; Perry v. Chester, 36 N. Y. Superior Ct. Rep., 298

The case in 53 N. Y., 240, reported special term on demurrer, 12 Abb., N.S., 131, does not seem to be the same case as that in 36 Superior Court Rep., as the case in Court of Appeals was argued May 14, 1873, while the Superior Court case was not decided till June 28, 1873. Besides, the Court of Appeals say (53 N. Y., 242) "there is no opinion of the general term:" Marshall v. Fisher, 43 Md., 46; Levy v. Steinbach, 48 Md., 212.

But see Ainslee v. Boynton, 2 Barb., 258; McGregor v. McGregor, 28 N.

Y., 237; Zogbaum v. Parker, 55 N. Y., 120; Jordan v. National, etc., 74 N. Y., 468.

Otherwise as to an equitable set-off not statutory: Davidson v. Alfaro, 16 Hun, 360, affirmed 10 Week. Dig., 56. Though the attorney may protect himself by taking an assignment of a verdict or report before judgment: 22 Eng. Rep., 670; Robert v. Carter, 38 N. Y., 107, reversing 14 How. Pr., 44, 17 How. 479, 524, 28 Barb., 462, 9 Abb., 366; Ely v. Cook, 28 N. Y., 365; Mackey v. Mackey, 43 Barb., 58; Zogbaum v. Parker, 66 Barb., 841, 51 N. Y., 120; Perry v. Chester, 53 N. Y., 240; Prouty v. Swift, 10 Hun, 232; Swift v. Prouty, 6 Hun, 94, 64 N. Y., 545; Burstenbinder v. Davrau, 3 Alb. Law Jour., 147; Graves v. Woodbury, 4 Hill, 559; Spencer v. Barber, 5 Hill, 568; Davenport v. Ludlow, 3 Code Rep., 66; Kellogg v. Schuyler, 2 Den., 73; Fermenich v. Bovee, 1 Hun, 532; Peckham v. Barculow, Lalor's Sup., 112; Rice v. Garnhart, 35 Wisc., 262. See Davidson v. Alfaro, 16 Hun, 359, 10 Week. Dig., 56; Wood v. Merritt, 45 How., 471.

[8 Chancery Division, 201.]

FRY, J., March 2, 1878.

\*Keene v. Biscoe.

[1877 K. 17.]

## . Mortgagee-Punctual Payment-Calling in-Acceptance of Interest-Waiver.

A mortgagee agreed with the mortgagor that if the interest was duly and punctually paid the principal should remain for two years. Six months' interest became due and was demanded but was not paid; and the mortgagee then demanded payment of principal and interest. Three days afterwards the mortgagor paid the six months' interest, which was received by the mortgagee:

interest, which was received by the mortgagee:

Held, that the mortgagee had not thereby, nor by a subsequent unaccepted offer to

receive an instalment, waived his right to call in the principal.

Langridge v. Payne (1) observed upon.

BEFORE the month of October, 1875, James Keene, the plaintiff, agreed to lend to Thomas Biscoe, the defendant, the sum of £400, on the security of certain leaseholds called the Horseshoe Inn, in Goswell Street. On the 15th of May, 1876, by a deed then dated, Biscoe covenanted with Keene to pay on demand £400, and interest at 5 per cent. per annum from that day to the day of repayment; and it was

provided that if Biscoe should duly and punctually pay interest for the said sum of £400 at the rate aforesaid, by half-yearly payments, then Keene would allow the said sum of £400 to remain for two years; and Biscoe covenanted for payment at the end of the two years of £200, part of the £400, and interest thereon, and the residue of the sum of £400 on demand; and Biscoe charged the leaseholds with the said sum of £400 and interest, and covenanted to execute at any time, at the request of Keene, a legal mortgage of the leaseholds in favor of Keene, with such powers and provisos as Keene might require. The £400 was advanced, and on the 16th of December, 1876, six months' interest became due. Keene had claimed that under a verbal agreement the money was to be paid off by annual instalments of £100, and his solicitors wrote, during the month of January, demanding payment of £100 and of the interest then Nothing was paid by Biscoe, and his solicitors wrote denying that the £100 instalment was due. On the 16th of January, 1877, \*Keene served Biscoe with a notice [202] demanding immediate payment of the £400 and interest, and in default the execution of a legal mortgage. On the 19th of January, 1877, Biscoe's solicitors paid Keene's solicitors £10 for a half-year's interest, and Keene's solicitors wrote to Biscoe's as follows:--"Without prejudice to the notice we have given, we acknowledge receipt of your check for Keene's solicitors wrote on the 6th of February. 1877, offering to accept an instalment of £100. No notice was taken of their letter, and this action was then brought by Keene, the mortgagee, claiming that Biscoe might be ordered to pay the £400, or in default to assign the leaseholds and be foreclosed.

Biscoe, by his statement of defence, denied that the £100 instalment was payable, and insisted that the payment of £10 interest was made generally, and must be taken to have relation to the day on which it became due; and that the receipt of interest condoned the default in payment, if any.

North, Q.C., and Speed, for the plaintiff: The defendant, by not paying the interest punctually, has lost the benefit of the agreement not to call in the money, and the receipt of interest does not waive the rights of the plaintiff: Clough v. London and North Western Railway Company (1): Thompson v. Hudson (2).

ny ('); Thompson v. Hudson (').

Cookson, Q.C., and G. W. Lawrance, for the defendant:
The plaintiff has waived his right to call in the £400. He should have returned the check if he meant to retain his right.

<sup>(1)</sup> Law Rep., 7 Ex., 26, 84.

<sup>(2)</sup> Law Rep., 4 H. L., 1.

The receipt of interest cures the default: Langridge v. Payne (1); Fisher on Mortgages (2); Davenport v. Reg. (3); Croft v. Lumley ('). It is the plaintiff's duty to show that the time has arrived when he can exercise his right to call in the money.

FRY, J., after stating the facts, and expressing his opinion that the form of the receipt for the £10 paid was imma-203] terial, because \*what was paid could not be affected by the terms of the receipt, quicquid solvitur solvitur ad

modum solventis, continued:

Then did the receipt of the £10 waive the plaintiff's right to payment which had already accrued? I see nothing in it to have that effect. Where a right has accrued it can be waived, but to amount to waiver there must be something done which is inconsistent with the continuance of that Now, the right here was to immediate payment of £400 and interest, and the receipt of a portion of that sum is in no way inconsistent with that demand. I cannot conceive any case more different from that of receipt of rent after a forfeiture. In that case non-payment of rent has given rise to a right of forfeiture, but if the landlord afterwards receives any rent, that puts an end to his right of forfeiture; for if, after knowing the circumstances, he accepts rent, he in fact says that though he might have avoided the lease he has chosen not to do so; he has chosen to say that the lease shall subsist, and he cannot then say that it shall The receipt of money as rent is inconsistent not subsist. with the determination of the lease. But I see no inconsistency here.

It is said that this case is governed by the decision of Langridge v. Payne (1). And if this question was really there decided, I should certainly follow that decision; but that case is one which I cannot help regretting to find reported, because the judgment does not tell the reader upon what principle it proceeded, and it is merely a judgment restraining an ejectment until the hearing. The case was this: There was an agreement in writing that the mortgagee would not call in the money for two years, the mortgagor fulfilling the covenants. The mortgagor forgot to pay the interest, and the mortgagee gave him notice that in consequence of his failure to pay interest the mortgagee would not be bound as to the two years, but would exercise his discretion, and the letter requested payment of the interest due and the costs. The interest and costs were paid, and

<sup>(1) 2</sup> J. & H., 423.

<sup>(3) 3</sup>d ed., vol. i, p. 348.

<sup>(3) 3</sup> App. Cas., 115; 24 Eng. R., 65. (4) 6 H. L. C., 672.

then the mortgagee issued a writ in ejectment. He was restrained until the hearing. Now the Vice-Chancellor might have thought that the notice was a conditional demand, and that the mortgagee in fact said, "If you make this payment I will for the present waive my right;" and \*if that [204 was so there was ground for the injunction. It is worthy of note that when that case was called to the attention of the judge of the Landed Estates Court in Ireland, in In re Taaffe's Estate ('), he spoke in very strong terms, and said that the case would be overruled, and that he could not conjecture the ground of the doctrine on which it was decided. In other words, he thought it a mere determination on the balance of convenience till the hearing, and not on any doctrine. There is no principle in Langridge v. Payne (\*) inconsistent with my decision.

It was then suggested that by what took place subsequently, the plaintiff waived his right; and reliance was placed on the letter of the 6th of February, 1877. That letter refers to a suggestion that there was a verbal agreement as to the instalments. But the letter meant simply, "I have a right, but if you, the defendant, comply with my demand, I shall not enforce that right," just as in Langridge v. Payne, where the Vice-Chancellor may have thought that a condition had been made and complied with. But here it was not complied with, and the offer, if ever made, fell to the ground. There is nothing in that letter inconsistent with the claim of the plaintiff now to enforce his right.

It appears to me that this action is perfectly well grounded; and I must give judgment for payment of the £400 and interest, and if the money is not paid, then for conveyance of the legal estate; and the defendant must pay the costs of the action.

Solicitors for plaintiff: Layton, Son & Lendon. Solicitor for defendant: A. E. Briant.

(1) 14 Ir. Ch. Rep., 847.

(\*) 2 J. &. H., 423,

See 2 Jones on Mortgages, §§ 1179-1186.

Where a mortgage sought to be foreclosed contains a clause that the mortgagee may, at his election, consider the principal as due on a failure to pay interest, the complaint must contain an allegation that he so elects or he can only recover the interest: Howard v. Farley, 3 Rob., 599.

Courts will not relieve the mortgagor

from the operation of a condition in a mortgage, that upon failure to pay any part of the principal or interest the entire principal shall become due: Valentine v. Van Wagenen, 37 Barb., 60, 23 How. Pr., 400; Ferris v. Ferris, 28 Barb., 29, 16 How. Pr., 102; Thompson v. Hudson, L. R., 4 H. L., 1; Thompson v. Hudson, L. R., 6 Chy., 325; Voorhis v. Murphy, 26 N. J. Eq., 434.

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See also Thompson v. Hudson, L. R., 4 H. L., 1; L. R., 6 Chy. App., 320; Penniman v. Elliot, 27 Barb., 315.

In Upper Canada, by rule of court, the court may relieve: Tyler v. Hinton, 42 U. C. Q. B., 228, 3 App. Rep., 53.

The court cannot relieve from such forfeiture, even though the mortgagor is unable to find the holder of the mortgage until after the time for payment had passed, unless there was trick or fraud on the part of the plaintiff to prevent the payment: Dwight v. Webster, 32 Barb., 47, 10 Abb. Pr., 128.

Otherwise if the mortgagees have been guilty of any trick or oppressive conduct: Ferris v. Ferris, 28 Barb., 29, 32, 16 How. Pr., 103; Western Bank v. Sherwood, 29 Barb., 883; Broderick v. Smith, 26 Barb., 539, 15 How. Pr., 434; Voorhis v. Murphy, 26 N. J. Eq.,

**43**5.

Where a mortgage contains a clause authorizing the mortgagee, upon nonpayment of interest for thirty days after it becomes due, after a default has occurred and the mortgagee has made his election in accordance with the stipulation, he cannot be compelled to accept the interest and waive the stipulation. Nor is he estopped from asserting his right of election, by the commencement of a foreclosure suit prior to the expiration of the thirty days, the complaint wherein simply sets up a default in the payment of an instalment of principal then due, and of the interest. Nor does he waive his right to file an amended and supplemental complaint, and proceed in the action for the collection of the balance unpaid: Malcolm

v. Allen, 49 N. Y., 448.

See Hudson v. Thompson, L. R., 4
H. L., 1; Penniman v. Elliot, 27 Barb.,

815.

Where the mortgagee died eight days before the time fixed for payment of interest, in default of payment of which the mortgagee was entitled to elect to claim the entire principal; held, the mortgagor was bound to ascertain within a reasonable time whether a representative had been appointed, and to offer to pay him such interest, and failing to do so, equity would not relieve him from his default: Mohay v. Leekie, 42 Md., 474.

The unconditional acceptance of the interest due on a mortgage (though made after a summons and complaint

for the foreclosure thereof has been prepared and filed with a notice of *lis pendens* in the county clerk's office but not served) is a waiver of a condition in the mortgage that, when the interest has remained in arrear for thirty days, the whole principal sum shall become due, and the action of foreclosure cannot be further prosecuted after such acceptance: Lawson v. Barron, 18 Hun, 414.

See Thompson v. Hudson, L. R., 4 H. L., 1; Penniman v. Elliot, 27 Barb.,

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A bond, secured by a mortgage, provided that on default in the payment of the interest thereon for thirty days after the same had become due, the principal should, at the option of the

obligee, become payable.

Held, that after the obligee had ratified several parol extensions of the time for paying the interest, made by her agent, a subsequent similar extension would be deemed a waiver of the forfeiture, and a suit at law to enforce the bond on the ground of such forfeiture would be enjoined: Bell v. Romaine,

30 N. J. Eq., 24.

Under an interest clause in a mortgage, providing that upon default for more than sixty days in the payment of interest after it comes due, the whole principal should, at the option of the mortgagees, become immediately due and payable, it is held that where the mortgagor in good faith and upon reasonable grounds denied his liability to pay interest, or claimed that he had paid it, he could not, by virtue of this clause, be made liable to pay the whole principal at once, even though it should turn out, upon trial of the matter, that he was in error. This clause is in the nature of a forfeiture or penalty, its object being to punish for the wilful neglect of a clear duty, and to hold it applicable to a case where there was an honest dispute would be harsh and unjust, and contrary to equity: Wilcox v. Allen, 36 Mich., 160.

A mortgage made payable by instalments, with interest on each as it became due, contained a stipulation that if any of the instalments should remain unpaid for the space of thirty days after the same became payable, that the whole principal sum, with interest remaining unpaid, should forthwith become due and payable. Default was

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made in payment of some of the instalments; the mortgagee, however, did not call in or insist upon payment of the whole sum remaining unpaid, but continued to receive payments from the mortgagor on account. On a bill to redeem, the mortgagee claimed to be entitled to charge interest on the whole sum due at the time of each payment,

in consequence of the default which had occurred.

Held, affirming the finding of the master, that he could claim interest only on each of the instalments as it became due, according to the terms of the proviso for redemption: McLaren v. Miller, 20 Grant's Chy., 637.

[8 Chancery Division, 205.]
FRY, J., March 18, 19, 1878.
\*JONES V. DAVIES.
[1877 J. 110.]

[205]

Mortgage—Power of Salo—Trust of surplus Sale Moneys—Inconsistency between Reservation of Equity of Redemption and Trust of surplus Sale Moneys—Resulting Trust—Conversion—Real and Personal Representatives.

By a marriage settlement land of the husband was conveyed, "for making a provision" for the wife and the issue of the intended marriage, to such uses as the husband and wife should during their joint lives by deed appoint, remainder to the use of the husband for life, remainder to the use of the wife for life, remainder to the use of the children of the marriage as the husband and wife should by deed jointly appoint, or as the survivor should by deed or will appoint, and, in default of appointment, to the use of the children in equal shares as tenants in common in fee, and, if but one child, to the use of that one child in fee, with an ultimate remainder in default of children to the use of the heirs and assigns of the husband. There was a proviso that the grantees to uses and the survivor of them, and the executors and administrators of the survivor, their or his assigns, should, after the death of the survivor of the husband and wife, and during the respective minorities of any of their children, receive the rents of the share of such child or children, and should, after providing for his, her, or their maintenance and education, invest the suplus (if any) as therein mentioned, and accumulate the same in trust for the persons who should ultimately become absolutely entitled to the shares from which the same should have proceeded. No money fund (other than these accumulations) was included in the settlement, and it contained no power of Some years after the solemnization of the marriage the busband and wife mortgaged the property. The mortgage deed contained a recital of the settlement, and a recital that the husband and wife had requested the mortgagee to lend them £600 on the security of the property, which he had agreed to do, but it contained no other recital, and by it the husband and wife, in exercise of their joint power, appointed the property to the use of the mortgagee in fee, but subject to a proviso for redemption on payment of the mortgage money. The proviso was for reconvey-ance of the property to the uses of the settlement. The mortgage contained a power for the mortgagee to sell the property, and a declaration that, in case the property or any part of it should be sold under the power, the mortgagee should, after paying the expenses of sale and the principal and interest due upon the mortgage, pay over the surplus (if any) to the husband, his heirs, executors, administrators, or assigns. After the death of the husband the mortgagee sold the whole of the property, and, after payment \*of expenses and the mortgage debt and interest, there [206] remained a surplus in his hands:

Held, that there was no resulting trust of the surplus, but that the husband's personal representative was entitled to it as part of his personal estate.

This action was brought by a mortgagee, who had in his hands surplus moneys resulting from the sale of the mort-

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gaged property under a power of sale, to determine who was entitled to those moneys.

On the 29th of October, 1855, a settlement was executed in contemplation of a marriage then intended between John This deed contained recitals Davies and Gladice Davies. of the agreement for the marriage; that John Davies was seised in fee of the hereditaments thereinafter described: and that upon the treaty for the intended marriage it was agreed that the property should be assured by John Davies to David Davies and Thomas Williams to the uses, upon the trusts, and for the ends, intents, and purposes thereinafter expressed concerning the same. And it was witnessed that, in pursuance of the agreement, and in consideration of the intended marriage, "and for making a provision for the said Gladice Davies in case the said marriage shall take effect, and for the issue (if any) of the said intended marriage," John Davies granted to David Davies and Thomas Williams and their heirs the hereditaments therein described, to have and to hold the same unto David Davies and Thomas Williams, their heirs and assigns, forever, "to the uses, upon the trusts, and for the several ends, intents, and purposes, and under and subject to the several powers, provisos, limitations, declarations, and agreements hereinafter declared or expressed of and concerning the same (that is to say), to the use of the said John Davies and his heirs until the solemnization of the said intended marriage, and, from and after the solemnization thereof, to such uses, upon such trusts, and for such intents and purposes, and under and subject to such powers, provisos, declarations, and agreements, and charged and chargeable in such manner and form as the said John Davies and Gladice Davies, his said intended wife, shall at any time or times, or from time to time during their joint lives, by any deed or deeds, jointly direct, limit, or appoint." And in default of appointment the property was limited to \*the use of John Davies and his assigns during his life, with remainder to the use of Gladice Davies and her assigns during her life, with remainder to the use of all and every the child or children of the marriage, or such one or more exclusively of the others of them as John Davies and his wife should by deed jointly appoint, or as the survivor of them should by deed or will appoint, and, in default of appointment, to the use of all and every the child and children of the marriage in equal shares, if more than one, as tenants in common in fee, and, if there should be but one such child, to the use of that child in fee, with remainder, in the event of the death of any of the chilFrv. J.

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dren under twenty-one without leaving issue living at the time of their deaths respectively, to the use of the other children in equal shares as tenants in common in fee, with remainder, in case every child of the marriage should die under twenty-one without leaving issue living at their deaths respectively, to the use of the heirs and assigns of John There was a proviso that David Davies and Thomas Williams and the survivor of them, and the executors or administrators of such survivors, or their or his assigns, should, after the death of the survivor of John Davies and Gladice Davies, and during the respective minorities of any of their children, receive the rents of the share of such child or children in the settled hereditaments, and apply the whole, or a competent part thereof, in or towards his, her, or their maintenance and education, and invest the surplus (if anv) in the names or name of the trustees or trustee for the time being in the securities therein mentioned, and accumulate the same, and that the accumulations should belong to and be in trust for the person or persons who should ultimately become absolutely entitled to the share from which the same should have proceeded. There was a power of appointing new trustees, and other ordinary trustee clauses, but not a receipt clause. The deed contained no power of sale, and no settlement of any money fund, other than the accumulations of rents during the minorities of the children. The marriage took place soon after the execution of the settlement.

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By an indenture of mortgage dated the 24th of June, 1862, after a recital of the settlement, and a recital that John Davies and his wife had requested W. J. Evans to advance them £600 at \*interest on the security of the prop- [208] erty comprised in the settlement, which Evans had agreed to do, it was witnessed that, in pursuance of the agreement, and in consideration of £600 paid by Evans to them, John Davies and his wife, in pursuance of and in exercise and execution of the power reserved to them by the settlement, appointed the property to the use of Evans in fee, but subject, nevertheless, to the proviso for redemption, and to the powers, provisos, declarations, and agreements thereinafter expressed and contained. And it was further witnessed that John Davies and his wife granted, released, and confirmed the property unto Evans, his heirs and assigns, to have and to hold the same unto and to the use of Evans, his heirs and assigns, forever, subject to the proviso for redemption thereinafter contained. And it was provided that, if

25 ENG. REP.

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Davies and his wife, their heirs, executors, or administrators, or any or either of them, should, on the 24th of June. 1863, pay to Evans, his executors, administrators, or assigns, the £600, with interest as therein mentioned, then Evans, his heirs or assigns, would, at the request and costs of John Davies and his wife, their heirs or assigns, or some or one of them, reconvey the property "to such and the same uses, upon such and the same trusts, intents, and purposes, and subject to such and the same powers, provisos, declarations, and agreements, as were limited and expressed of and concerning the same in and by the said recited indenture of settlement, or as near thereto as the deaths of parties and other circumstances will then permit," free from incumbrances occasioned by Evans, his heirs or assigns. was also a power to sell the property, if default should be made in payment of the £600 or the interest, exercisable by Evans, his heirs, executors, administrators, or assigns. There was a proviso that the power of sale should not be exercised without giving six months' notice to John Davies and his wife, their heirs, executors, administrators and assigns, or some or one of them. And it was declared that. in case the property or any part of it should be sold under the power of sale. Evans, his heirs, executors, administrators or assigns, should, out of the purchase-moneys, pay the expenses of the sale or sales, and, in the next place retain the £600 and interest, or so much thereof as should then remain due, "and shall pay over the surplus (if any) to the said John Davies, his heirs, \*executors, administrators, or assigns." There was a covenant by John Davies for himself, his heirs, executors, and administrators, and for his wife, that he and his wife, their heirs, executors, administrators, or assigns, or some or one of them, would pay the mortgage money and interest at the time appointed, and a similar covenant for title. On the 24th of January, 1872, Evans transferred the mortgage to D. W. Jones, the plaintiff in this action. In 1869 John Davies died intestate. and administration of his personal estate was granted to his She afterwards married Martin Butler.

There were seven children of John Davies and his wife. In October, 1875, the plaintiff, in exercise of the power of sale, sold the whole of the mortgaged property, and, after payment of the principal, interest, and costs, there remained in his hands a balance of £2,488 14s. 4d. This sum was claimed by Mrs. Butler as part of the personal estate of John Davies; by his eldest son as his heir-at-law; and by the surviving trustee of the settlement, and the other six chil-

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The action was brought dren, as subject to the settlement. to ascertain the rights of the parties.

This was the trial.

H. A. Giffard, for the plaintiff, stated the case.

Hadley, for the children, other than the heir-at-law: I cannot dispute that the power given to the husband and wife by the settlement is a general one, for, though it enables them to defeat the settlement altogether, its language is unambiguous: Peover v. Hassel ('). Still the origin and object of the power must be regarded; the intention of it obviously was to enable the husband and wife to borrow money if the exigencies of their family should require it. There is nothing in the mortgage deed to show an intention of doing anything more than borrow money, and it cannot be supposed that the parties intended to defeat the settlement, except for the purpose of raising the money. would be absurd to suppose that the devolution of the property was intended to depend upon the will of a mere stranger, upon the accident whether the mortgagee should or should not exercise \*his power of sale. The right inference is, that a mistake has been made in the direction as to the payment of the surplus sale money, and that there is a resulting trust upon trusts corresponding to the uses of the settlement. There is no authority directly in point, but there are numerous cases in which, where a wife's real estate or real estate in settlement has been mortgaged to secure a loan to the husband, and the equity of redemption has been reserved in terms such as to change the devolution of the property, the court has held that a mortgage only was intended, and has implied a resulting trust in favor of the persons originally entitled, unless there was a clear manifestation of a contrary intention: Jackson v. Innes (\*); Broad v. Broad (\*).

[Fry, J., referred to Plowden v. Hyde (').]

Huntington v. Huntington (\*); Rowel v. Walley (\*); Rus-

combe v. Hare ('); Jackson v. Parker (').

[FRY, J., referred to Martin v. Mitchell (\*), as stating very clearly the effect of the decision in Jackson v. Innes.]

Whitbread v. Smith ("); Lord Hastings v. Astley ("); In re Betton's Trust Estates ("); Sugden on Powers ("). The presumption is, that a mortgage is executed solely for the

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(¹) 1 J. & H., 841.
(²) 1 Bli., 104.
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<sup>(3) 2</sup> Chan. Cas., 93, 161.

<sup>(4) 2</sup> D. M. & G., 684.

<sup>(&</sup>lt;sup>5</sup>) 2 Vern., 437.

<sup>(6) 1</sup> Rep. in Ch., 116.

<sup>(1) 6</sup> Dow, 1.

<sup>(5)</sup> Amb., 687. (7) 2 Jac. & W., 413. (10) 3 D. M. & G., 727.

<sup>(11) 30</sup> Beav., 260.

<sup>&</sup>lt;sup>19</sup>) Law Rep., 12 Eq., 553,

<sup>(13) 8</sup>th ed., pp. 274-285,

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purpose of raising money, and the mortgagor does not contemplate the mortgagee selling more than so much of the

property as will satisfy his debt.

North, Q.C., and E. Wilkinson, for the husband's admin-The settlement is a strictly legal one of land; istratrix: there is no settlement of money, except in the case of an accumulation of surplus rents during the minority of the The words of the trust of the surplus sale moneys in the mortgage are clear and unambiguous, and the marked distinction between them and the words of the reservation of the equity of redemption points to an intention that, if the property was turned into money, it should \*devolve differently than it would do if it remained There would be nothing absurd in such an inten-If a resulting trust is to be implied there is nothing to show what its nature is to be. What would be the power of the trustees? Lord Cranworth's Act, 23 & 24 Vict. c. 145, s. 34, does not apply, because the trust is not declared by a written instrument. The power of appointment in the settlement is an absolute one, and the inference is that the husband and wife intended to defeat the settlement in case the land should be turned into money. The case is not like those cited, the difficulty does not arise upon a comparison of the reservation of the equity of redemption with the original limitation of the property, but it arises entirely on the construction of the mortgage deed itself, and there is no difficulty in construing that. Some of the observations of Vice-Chancellor Wickens in In re Betton's Trust Estates (') are in our favor, and so are those of Lord Redesdale in Jackson v. Innes ('). Scholefield v. Lockwood (') is an authority in our favor, and so are Reeve v. Hicks (1), Heather v. O'Neil ('), Atkinson v. Smith ('), Anson v. Lee ('). The direction to pay the surplus sale moneys to the husband is analogous to an express trust in his favor, and in Heather v. O'Neil Lord Justice Turner said that where an express trust is declared, that is inconsistent with the notion of there being any resulting trust.

[They referred also to In re Vizard's Trusts (\*); Dawson

v. Bank of Whitehaven (°).]

Tyssen, for the heir-at-law, adopted the same argument. Hadley, in reply: The mortgage deed recites only the agreement for a loan; it recites no intention to change the

<sup>(1)</sup> Law Rep., 12 Eq., 558.

<sup>(2) 1</sup> Bli., 114, 126.

<sup>(8) 4</sup> D. J. & S., 22.

<sup>(4) 2</sup> S. & S., 403.

<sup>(5) 2</sup> De G. & J., 399.

<sup>(6) 8</sup> De G. & J., 186.

<sup>(1) 4</sup> Sim., 364.

<sup>(8)</sup> Law Rep., 1 Ch., 588.

<sup>(9) 6</sup> Ch. D., 218; 22 Eng. R., 766.

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devolution of the property. In Scholefield v. Lockwood the wife only claimed to be indemnified against the mortgage The decision in *Heather* v. O'Neil depended on very special facts; it is really an authority in my \*favor. Anson v. Lee (') is disapproved by Lord St. Leonards in Sugden on Powers (\*). In re Vizard's Trusts (\*) does not The direction as to the payment of the surplus sale moneys arose from the fact that the settlement did not desig-

nate any one to whom they were to be paid.

FRY, J., after stating the effect of the settlement, contin-Now, that settlement was one of a strictly legal char-The trustees took no legal estate. They were mere grantees to uses, and the interests of the persons claiming under the settlement were legal interests. There was no power of sale in the settlement, and there was no settlement of any money. It was a strict settlement of land, creating uses and nothing more, with the single exception of the right of entry given to the trustees in the event of the minority of the children after the death of the parents.

It is to be observed also that the settlement, although it is stated to be executed for the purpose of making a provision for the wife and the issue of the marriage, nevertheless put the estate absolutely and entirely in the power of the husband and wife during their joint lives, and enabled them, if they were so minded, to defeat either wholly or partially the provisions made for themselves or for their children.

His Lordship then stated the provisions of the mortgage,

and continued:

The question is whether the direction to pay the surplus of the sale moneys, in the event of the power of sale being exercised, to John Davies, his heirs, executors, administrators, or assigns, means simply what it says, or whether, from the circumstances of the case, a resulting trust is to be held to have arisen. That is the sole question for my decision.

I must observe, in the first place, that, as a general rule, deeds ought to be held to operate according to their express language. The express language of this deed is that the money in question shall be paid to John Davies. So far as the language of the deed goes, that is quite clear; and it is not a case in which there can \*be any suggestion of [2]3 It cannot be said that the direction to pay the surplus money to Davies is a fraud on any one claiming under the settlement, for Davies and his wife had the absolute control of the settled property,—they might do whatever

(1) 4 Sim., 364.

(2) 8th ed., p. 278.

(8) Law Rep., 1 Ch., 588.

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they liked with it. Can I say that this clause, on which everything turns, has been introduced by reason of some inaccuracy? Can it be said that the provision which ought to have been inserted in the deed in place of the direction to pay to John Davies is one which the circumstances so clearly show to be proper that I can infer that a mistake has been made when I do not find that provision there? It appears to me that I cannot draw any such inference. quite true that in some cases more or less like this the court has inferred a mistake; but the extent to which that inference has gone is, I think, clearly expressed in the judgment of Lord Justice Turner in Heather v. O'Neil ('). that "in cases depending merely upon the reservation of the equity of redemption, variations which can reasonably be referred to mistake or inaccuracy are not to be regarded, but if the variations be such that they cannot from their nature be referred to mistake or inaccuracy, I think they must have their effect." Now this is not a case depending, as the Lord Justice expressed it, merely on the reservation of the equity of redemption, because the equity of redemption is distinctly reserved to the uses of the settlement, and the question really turns on the difference between that reservation and the direction as to the surplus moneys. not think it would be safe or right to extend the inference of mistake or inaccuracy to cases in which it does not clearly arise in the mind of the court, or to which the principles explained by Lord Justice Turner do not extend. I cannot hold, therefore, that there has been any mistake or inaccuracy in this case. But it is said that it would be manifestly absurd to hold that the deed is to operate according to its Let us see what the result will be of giving effect to it simply as it stands. It is this, that, in the event of the mortgaged property being redeemed and remaining in specie as land, the settlement will still exist, and the successive interests of husband, wife, and children will remain in force. But, if the mortgage is not redeemed, and if the mortgagee 214] \*exercises his power of sale, and thereby turns the land into money, then the husband is to receive it. Such an arrangement, it seems to me, is not an unreasonable one. and the husband and wife might very well be supposed not to object to it. They might say: "So long as the land remains land we desire that the settlement shall subsist, but, if the land is turned into money, we do not intend to cast upon our trustees the burden of a new settlement. settlement no provision exists with regard to a money

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fund, and we have no intention of creating a new money settlement."

Then, again, I inquire, is there any ambiguity in the terms of the deed as it stands? I am at a loss to find any. parties to the deed, the husband and wife, intended to do what they have said, and nothing more, they seem to me to have expressed themselves with ample clearness. true that there is no recital of an intention that the surplus sale moneys shall be paid to the husband, and it is said that in the absence of such a recital I am bound to infer that the money was intended to go upon trusts corresponding with the legal uses of the settlement. It seems to me that that is a very strong contention. The difference between a settlement of land and a settlement of money is one which every one conversant with the law knows. The trustees of the settlement had not undertaken to be trustees of any money fund, no trust had been declared of any money. powers of investment were inserted in the settlement which were applicable to such a fund; and it appears to me that, if the parties had been minded to create that which did not exist before, a money settlement, we should have found that intention expressed in clear and unambiguous language, and provisions inserted in the deed to give effect to that intention.

Further, it is said that I am bound by the circumstances of the case to come to the conclusion that there was a resulting trust of this money. What are the circumstances under which that inference could with propriety be drawn? There have been many cases in which the court has had to put an interpretation upon the uses referred to in a proviso for redemption, where that, and that almost alone, has been the question for decision. The principle of these cases is well expressed in *Jackson* v. *Innes* ('), \*where Lord [215] Redesdale used this language: "It must now be admitted as an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife, or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or where the words admit of any ambiguity, that there is a resulting trust for the benefit of the

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wife, or for the benefit of the husband, according to the circumstances of the case."

I am not convinced that Lord Redesdale's language or his meaning extends to the kind of case which is before me. where the settlement was made subject to an absolute power of appointment in the husband and wife, giving them entire control over the property and enabling them to do what thev liked with it. Moreover, the cases to which he referred were those in which there is a mere reservation in the proviso for redemption, or an ambiguity in the words of the proviso for redemption. In the present case I have not to do with a mere reservation in the proviso for redemption, or with an ambiguity in the words of the proviso for re-The proviso for redemption is clearly to the uses demption. of the settlement, but a different trust is declared with regard to the surplus sale moneys. There is no ambiguity, according to my construction of the deed, and it is not therefore a case which comes within the principle laid down in Jackson v. Innes ('). Furthermore, it appears to me that there would be some difficulty in saying what the resulting trust in this case should be; would it require the husband to pay the moneys over to the trustees of the settlement, or would it require him to hold them for the benefit of himself, his wife, and his children? Upon what securities ought the trust fund to be invested? What power of changing the investments would there be? All these questions might be asked, and, in my opinion, they could not be easily an-Moreover, it must be observed that the resulting trust would include the general power of appointment, 216] and the husband and wife would \*be entitled by an exercise of that power to appoint the fund absolutely as they pleased.

In one word, it appears to me that a resulting trust is to be implied only where it appears that the taker is not intended to take beneficially. In this case there does not appear to me to be such an intention, and therefore I hold that there

is no resulting trust.

Consequently, as against Mr. Hadley's clients, I hold that the money is to go to John Davies, his heirs, executors, administrators, or assigns. The question now arises whether

it goes to the heir or to the administratrix.

North, Q.C., and E. Wilkinson, for the administratrix: The land has been converted into money, and it must devolve upon the person who is entitled to it in its actual condition. But for this declaration, the husband would have

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had no interest at all. Wright v. Rose (') and Bourne v.

Bourne (1) do not apply.

Tyssen, for the heir-at-law: The intention was that, if the power of sale was exercised during the husband's life, the money should become his personal estate; but that if, as has happened, the sale should take place after his death, the money should belong to his heir. The cases cited apply, and

are authorities in my favor.

FRY, J.: As between the heir and the administratrix, it seems to me that the money must go to the administratrix. It is in the nature of personal property. The trust to pay does not arise until after the conversion of the estate, and the personal representative is entitled to it. It must be borne in mind also that the husband, to whom the money is directed to be paid, had at the time no interest in the equity of redemption, except in respect of the ultimate remainder to him in the event of failure of issue, which event has not arisen. It appears to me that I am really dealing with this money as affected by a simple direction, given by persons who had \*the absolute control over the estate, that it [2]7 should be paid to a particular person.

I must therefore make a declaration that the legal personal

representative of John Davies is entitled to the fund.

The costs of all parties will be paid out of the fund.

Solicitors for plaintiff: Bower & Cotton, agents for T. H.

Stephens, Cardiff.

Solicitors for defendants: Norris, Allens & Carter, agents for W. J. Evans, Llandovery.

(1) 2 S. & S., 828.

(9) 2 Hare, 35.

[8 Chancery Division, 218.] C.J.B., Jan. 21, 28, 1878.

\*In re Bainbridge. Ex parte Fletcher. [218

Charge by a Partner on his Share in Partnership—Chose in Action—Bankruptcy Act, 1869, s. 15, subs. 5—Bills of Sale Act, 1854, s. 7—Joint Ownership—Partners.

B., as trustee and executor of his father's will, became entitled to one half share in a distillery business lately carried on in partnership between his father and another. In pursuance of a provision in the will, B. continued the partnership business, and afterwards purchased the interest of the beneficiaries under the will, and executed mortgages to secure the purchase-money, by one of which, dated September, 1872, B. assigned all his beneficial interest under his father's will as a security for payment of the money due, and by the same deed charged all his share and interest in the distillery partnership, and in the good-will of the business, with the repayment of the money due. New articles of partnership were then entered into between B.

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and the old partner, in which the former appeared as the owner of one half the business,

In June, 1877, B. was adjudicated bankrupt, and his share in the partnership had since been sold to the other partner:

Held, as between B.'s trustee in bankruptcy and the mortgagee, that the mortgage of B.'s share and interest in the partnership was a charge upon a chose in action, and as such, was not affected by the Bankruptcy Act, 1869, s. 15, or by the Bills of Sale Act, 1854:

Held, also, that to bring partnership goods within the order and disposition clause, they must have been in the sole and absolute possession of the bankrupt; and that, as the mortgagee of B.'s share had not acquired the right to take possession of any of the partnership property, B. was not in possession with the consent of the true owner.

Ex parte Dorman (1) followed. Ryall v. Rowles (2) considered.

This was an appeal from an order of the Surrey County Court judge dismissing a motion of Robert Fletcher, the

trustee in bankruptcy of T. Y. C. Bainbridge.

Thomas Drake Bainbridge (the father of the bankrupt) was a partner in the distillery in Holborn known as "Anderson & Company," his copartners being the bankrupt, to the extent of one-sixteenth, and Sir Allan Young. 8th of February, 1870, T. D. Bainbridge (the father) died, having by his will and codicil devised and bequeathed all his real and personal estate to two trustees, of whom T. Y. C. 219] Bainbridge was one, upon trust to sell, \*convert, and divide the same equally among his four sons, T. Y. C. Bainbridge, R. Bainbridge, E. Bainbridge, and E. R. Bain-Considerable discretionary powers as to conversion, winding up the partnership, and generally, were given by the will to the trustees. T. Y. C. Bainbridge eventually became the sole trustee of the will, and continued the business for some time in partnership with Sir Allan Young. 1872 arrangements were made for the purchase by T. Y. C. Bainbridge of the interests of his brothers under the will in the distillery, and mortgages were executed to secure the purchase-money. One of these mortgages, the validity of which was the subject of these present proceedings, was dated the 4th of September, 1872, and was between T. Y. C. Bainbridge of the one part, and E. R. Bainbridge of the other part. By this deed T. Y. C. Bainbridge purported to "assign (but not so as to pass his estate as trustee under the will, but only his beneficial interest thereunder) unto the said E. Rate Bainbridge, his executors, administrators, and assigns, all the share, estate, and interest of him the said T. Y. C. Bainbridge in and under the said recited will of the said T. D. Bainbridge, deceased, and of and in the moneys and estate thereby devised and bequeathed as aforesaid,"

<sup>(1)</sup> Law Rep., 8 Ch., 51.

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as a security for payment of the money due, and by the same deed "charged and made liable all the share and interest of him the said T. Y. C. Bainbridge of and in the said distillery, and of and in the said partnership, and of and in the good-will of the said business," with the repayment of the money due to his brother.

T. Y. C. Bainbridge continued a partner in the distillery with Sir Allan Young, new articles of partnership, dated the 1st of April, 1873, having been entered into between them, in which T. Y. C. Bainbridge appeared as the owner

of one half the business.

On the 11th of June, 1877, T. Y. C. Bainbridge was adjudicated a bankrupt; his share in the partnership had since

been sold to Sir Allan Young for over £40,000.

The mortgage of the 4th of September, 1872, was admitted by the bankrupt's trustee to be a valid charge to the extent of over £26,000, being the value of an undivided moiety of the distillery and premises, and of the fixtures thereon not being tenant's or trade fixtures; but the trustee, as against E. R. Bainbridge, the mortgagee, claimed to be entitled to the proceeds of sale of the \*bankrupt's interest, amounting to over £14,000, in "the tenant's and trade fixtures in or upon the said distillery and premises, and in the plant, stock-in-trade, assets, property, good-will, and book debts of the late firm of Anderson & Co.," on the ground that the stock-in-trade and debts were within the provisions of the Bankruptcy Act, 1869, s. 15; and also claimed the fixtures under the Bills of Sale Act, 1854, as the mortgage had never been registered in pursuance of that act. county court judge having disallowed this claim, the trustee now appealed.

Winslow, Q.C., and Northmore Lawrence, for the appel-If a mortgagee of one partner's share allows the mortgagor to retain possession of the mortgaged property and to act as an ostensible partner, his security will not, as to chattels which are within the doctrine of reputed ownership, on the bankruptcy of the mortgagor, prevail against his trustee, Ryall v. Rowles (1); Robson on Bankruptcy (2); and even the lien of the other partners upon such goods and chattels will be overridden in favor of the creditors of those in whose order and disposition the goods and chattels were at the time of the bankruptcy: Lindley on Partnership (\*). The stock-in-trade and the debts having been left in the order and disposition of the bankrupt, we are also entitled, under the 5th sub-section of sect. 15 of the

<sup>(1) 1</sup> Ves. Sen., 375.

<sup>(2)</sup> Page 640.

<sup>(8) 3</sup>d ed., p. 1194.

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Bankruptcy Act, 1869. [They also referred to the mode of execution against a partner by the sheriff, and observations thereon in Lindley on Partnership (').] As to the fixtures, we claim them under the Bills of Sale Act, 1854, as the mort-

gage is not registered.

De Gex, Q.C., Charles Browne, and Finlay Knight, for the respondent: The mortgage of the 4th of September, 1872, was a mortgage of a chose in action; it was a mortgage of the bankrupt's "share and interest in the partnership," which was lawfully assigned to us before any act of bankruptcy was committed. The "share" of a partner is simply his proportion of the partnership assets after they have all been realized and converted into money, and all the \*debts and liabilities have been paid and discharged: Lindley (\*). Ryall v. Rowles (\*) is no longer applicable; though certainly a leading case to the effect that choses in action are goods and chattels, it is not now the law on any other point. What the mortgagee has under this deed is a charge on a share in the partnership, which gives him a right to institute proceedings to have accounts taken; this right is a chose in action, this mortgage is distinctly a mortgage of a chose in action.

To bring goods within the order and disposition of a bank-rupt under the Bankruptcy Act, 1869, s. 15, they must be in his sole possession and sole reputed ownership, Ex parte Dorman ('); the goods were in the bankrupt's possession only as one of the partners, and the law is the same even where one partner is allowed to carry on the business ostensibly as his own: Reynolds v. Bowley ('). If this mortgage is a mortgage of a chose in action, as we say it is, it is not within the operation of the Bills of Sale Act, for it is not a mortgage of anything that is "capable of complete transfer by delivery" according to sect. 7.

[They also cited Lindley (\*); Ex parte Kemp ('); Taylor v. Fields (\*); Skipp v. Harwood (\*); West v. Skip (\*); In re

Wait (").]

Winslow, in reply.

BACON, C.J.: The case of Ryall v. Rowles has been referred to at very great length, and it has been said that that case has never been disputed; and, no doubt, there is a great deal to be found in that case that never was disputed

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(1) 3d ed., pp. 707-709.
(2) 3d ed., p. 681.
(3) 1 Ves. Sen., 375.
(4) Law Rep., 8 Ch., 51.
(5) Law Rep., 2 Q. B., 474.
(6) 3d ed., pp. 708, 710, 718.
(7) Law Rep., 9 Ch., 383; 8 Eng. R.,
(8) 4 Ves., 396.
(9) 2 Sw., 386.
(10) 1 Ves. Sen., 239.
(11) 1 Jac. & W., 605.
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when that case was decided. There the court ultimately decided that the interests were choses in action, except all the fixtures, and that they passed under the order and disposition clause. But the law has been wholly altered since then. No choses in action now pass under the order and disposition \*clause except debts due in the course of [222 trade or business. The alteration of the law was made not unadvisedly, because very hard cases had occurred. However, I need not more particularly refer to that. What I most have to deal with are the facts of this particular case, and they appear to me to be admitted by the parties to be these: [His Lordship then stated the facts.]

Now the father's interest has not been questioned. After the charges upon the partnership were satisfied, what remained would be clear surplus. If his trustee chose to withdraw the capital from the business he would be entitled to receive his money; until then the interests of the persons entitled under the father's will were purely equitable.

There was no other way of dealing with their rights. The son, succeeding to the father's business, was, as to every part of the father's share, a trustee only, and he had no other right or interest in any part of it but in his character of trustee, and as trustee he must carry on his late father's business—and the testator meant that that should be so. The estate of the testator was, and always has been, an estate held in trust to carry on the business. Then the legatees, having thought it right to call for a division of this estate, bargain with the son to sell their interests, and the money not being forthcoming, he assigns to his brothers all the interest in his father's estate when it should be forthcoming, and he charges his own small interest in the partnership with the payment of the same debt. That, I think, is the state in which things happened to be when the act of bank-ruptcy was committed.

Now, the trustee here claims by relation to the act of bankruptcy, which is said to have been some time in the month of October, 1876. The trustee says that, the property having been left in the order and disposition of this bankrupt under the Bankruptcy Act, s. 15, he is entitled to claim it. First of all, it was not, in point of fact, within the order and disposition of the bankrupt at all. He was trustee and trustee only of it, except his own small share. But the act of Parliament is, in my judgment, perfectly clear, and even if I had not the assistance of Ex parte Dorman (1), and if I was not bound by that case I should act

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upon it. It is as clear as anything can possibly be. [His 223] \*Lordship read sect. 15, sub-sect. 5, and continued:] Can it be said that, these two gentlemen carrying on partnership together, any one part of this property remained in the order and disposition of the bankrupt with the consent of the true owner. Not only do I adopt the judicial interpretation in Ex parte Dorman (1), and say it relates to sole possession of that kind alone, but I say that it must be necessarily so, for it is impossible to point out anything in the case to show that either of these partners was more a partner than the other. Partners are possessed per mie et per tout; and each of them was lawfully in possession of the whole of the assets, but not exclusively in possession, not solely in possession. It is said that a partner might do and could do almost anything without limit, provided it is within the law-that every partner may deal as he will with the partnership property, and in collecting the partnership assets. How does he deal with them? Everything he does is done on the presumption that he is lawfully constituted agent of his partner, that is, that they are both owners; neither is more the owner than the other; neither is sole They are both entitled to do all lawful things until the conclusion of the partnership transactions; whichever of them does a thing, he does it for himself and the other. and does nothing, takes no action, except under the partnership. I am wholly at a loss to supply any words to sect. 15 such as the appellant suggests to me. If the exclusion of choses in action was not sufficient, then, I say, there is no sole possession—no sole order and disposition—no holding out to the world, and no other circumstances of that kind. The thing is essentially a chose in action and nothing The interest he had as trustee was a legal interest as distinguished from the beneficial interest which he had under his father's will, and that which was acquired by the transaction with his brother was a chose in action and nothing There can be no doubt, at this time of day, thrown upon the law that a partner is entitled only to such share of the partnership property as may exist after all the debts of the partnership are paid and the property has been realized; and when it has been realized it cannot be said that the partnership debts are paid but by realization. That is what the respondent in this case claims. He says, "I am the owner 224] \*of a chose in action lawfully assigned to me before any act of bankruptcy was committed, and if any act of bankruptcy was committed, to whatever it relates, it cannot

<sup>(1)</sup> Law Rep., 8 Ch., 51.

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apply to this chose in action. This right which I have is to take proceedings to require my brother to ascertain this trust estate—to withdraw it from risk if it is proper and right that it should be withdrawn from risk—to take accounts of the estate of the testator whose trustee he is, so that I may know to what I am entitled under the will, and that it may be ascertained." That is the simple state of the case.

With the greatest respect and veneration for the case of *Ryall* v. *Rowles* ('), I do not think that that case has the remotest application to this question before me, now that

the law is altered respecting choses in action.

A sum of money is due from Sir Allan Young, which may be sued for if it is not voluntarily paid, but which Sir Allan Young will not pay until he has a title to the thing he has purchased, and in order to make a title it is necessary that the respondent should join. The respondent holds a mortgage upon the estate of his father and a charge upon the estate of his brother—such as it was—the share which he had in the partnership. That charge must be satisfied by

payment to the man who is entitled. I therefore desire it to be understood that, in my opinion, there is no doubt about the right of a partner, notwithstanding the cases which have been referred to, and the dicta on the subject, and notwithstanding what Lord Eldon says in In re Wait ('), that that matter had frequently disturbed his mind, as to the right of the sheriff to seize. The sheriff may seize the share of a partner. He cannot seize the table or the chairs in their entirety because the other party is entitled, but he is entitled to half of everything that is there, a half of what is seized as well as of that which is not seized. The interest which a partner can have in the partnership is, not a right to the chattels—not any order or disposition of them otherwise than under the partnership contract; nor is it suggested here that there was any holding out, or anything of that sort, Whatever the sheriff may do, he can only seize that to which the partner may be entitled—his ascertained share. The interest which the respondent had was a chose in action and \*something which could [225] not be ascertained but by process of law; and, in my opinion, his mortgage and his charge are perfectly valid, and he is entitled to have them paid out of the purchase-money which Sir Allan Young has contracted to pay. The appeal must be dismissed with costs.

Solicitors for trustee: Lewis, Munns & Longden. Solicitors for E. R. Bainbridge: Minet, Smith & Co.

(2) 1 Ves. Sen., 375.

(9) 1 Jac. & W., 605.

### [8 Chancery Division, 225.] C.J.B., March 11, 1878.

# In re WINTER. Ex parte BOLLAND.

"Mutual Dealings"-Bankruptcy Act, 1869, s. 39.

One of the terms of an engineering contract was that the plant brought by the contractor on to the works should "be deemed the property of" the employers "for the time being," and should "not be removed during the progress of the work without the written order of the engineer," and that in case of suspension of the works by the engineer for any act or default of the contractor, the same should be "subject to be used" in and about the completion of the works. The works were suspended by the engineer, the contractor went into liquidation, and the works having been completed by the employers, the plant was by consent sold:

Held, that the plant did not become the property of the employers, and that the user of the materials by the employers after the suspension of the works was not such a "dealing" within the meaning of the 39th section of the Bankruptcy Act, 1869, as that the employers were entitled to set off the value of the plant against the

sum due to them from the contractor for breach of the contract.

#### [8 Chancery Division, 235.]

FRY, J., June 18, 1877. C.A., Feb. 22, 23, 1878.

# 235] \*ODESSA TRAMWAYS COMPANY V. MENDEL. [1876 O. 19.]

Specific Performance—Divisible Contract—Performance of Part—Agreement in part legal and in part illegal—Fraud—Ultra Vires.

An action was brought by a company for the specific performance by the defendant of an agreement which he had entered into to take 2,000 £10 shares in the company, and pay for them in such numbers and at such times as should be required for the purposes of the company. His name had been placed on the register of shareholders, and a call had been made upon him which he refused to pay. Contemporaneously with the agreement to take the shares the board of directors had agreed with the defendant to pay him £4,000 in consideration of services rendered by him to the company. This sum was to be paid twelve months after the shares should have been paid for in full. The directors afterwards called on the defendant to pay up the full amount of 1,000 of his shares, which he refused to do. The defendant alleged that the two agreements formed really only one contract for the issue of the shares at a discount; that he had not rendered any services to the company; and that the contract was divided into two parts for the express purpose of evading a provision of the company's articles of association which prohibited the directors from issuing shares at a price below par without the consent of a general meeting. No such consent had been given to the contract with the defendant:

Held, that, as the defendant had acted in collusion with the directors to defraud the company, he could not be heard to set up this fraud for the purpose of making invalid the agreement, which was ex facte valid, to take and pay for the shares:

That as the parties had contemplated a piecemeal performance of the one agree-

ment, the court could compel a performance of a part:

That, in the absence of any proof of mala fides, the resolution of the directors to call up the amount of the shares was conclusive evidence that the money was required for the purposes of the company.

Specific performance of the agreement to take and pay for the shares was accord-

ingly decreed.

The decision of Fry, J., affirmed.

This was an action for the specific performance by the defendant of an agreement by him to take and pay for shares in the Odessa Tramways Company, Limited. The company was incorporated, by registration under the Companies Acts, 1862 and 1867, in December, 1875, for the purpose of adopting and carrying into effect an agreement for the purchase of a concession, granted by \*the municipality of [236 the city of Odessa, in Russia, of the right to construct and work certain tramways in the city and suburbs of Odessa. The capital of the company was fixed at £360,100, divided into 36,000 shares of £10 each, and 100 founders' shares of £1 each.

Clause 10 of the articles of association was as follows: "The board may at any time, and from time to time, issue or dispose of any of the share capital for the time being unissued, to such persons, in such proportions, and at such price at or above par as the board may think fit, but no shares shall be issued at a price below par without the con-

sent of a general meeting."

Clause 36 provided: "The board may from time to time, if they think fit (provided that the option is, in the first instance, offered without preference to all the members), receive from any of the members willing to advance the same, all or any part of the moneys due upon their respective shares beyond the sums actually called for, and the amount for the time being paid in advance of calls shall bear interest at such rate as shall be determined by the board, not exceeding ten per cent. per annum."

By clause 37: "The board may also in like manner, and without prejudice to any other power given to them by the statutes" (meaning thereby the Companies Acts, 1862 and 1867, and any other act in force concerning joint stock companies and necessarily affecting the company) "or these

presents, do either or both of the following things:

"(1). Make arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid, and in the time of the payment of such calls.

"(2). Pay dividend in proportion to the amount called and paid up on each share, in cases where a larger amount

is called and paid up on some shares than on others."

The company did not succeed in getting many of their shares subscribed for by the public, and for the purpose of raising capital an agreement in writing was on the 4th of January, 1876, entered into between the company of the one

25 Eng. Rep.

Odessa Tramways Company v. Mendel.

C.A.

part, and the defendant, Alexander Mendel, of the other

part, whereby it was agreed as follows:—
"(1). The said A. Mendel shall subscribe for 2,000 shares
237] in \*the company, which shall be taken up and paid
for in full by him in such numbers and at such times as

shall be required for the purposes of the company.

"(2). In consideration of the said A. Mendel so subscribing and paying for the said shares the company agrees to give to the said A. Mendel the option of subscribing for 15,000 further shares in the company (being part of the first issue) at their par value, such option to be exercised as regards 5,000 shares part thereof within eighteen months from the date hereof, as regards 5,000 shares further part thereof within two years from the date hereof, and as regards 5,000 shares, being the remainder thereof, within three years from the date hereof. The company shall have the right of disposing of any of the said shares not subscribed for by the said A. Mendel within the times above mentioned.

"(3.) The said A. Mendel may, as regards all or any of the shares referred to in the preceding paragraph, either pay for the same in full, or pay such an amount in respect of such shares as shall be then called up in respect of each

of the other shares issued by the company."

This agreement was adopted by a resolution of the board of directors passed at a meeting on the 4th of January, 1876. Mendel was present at the meeting, and the agreement was then signed by him and by the secretary on behalf of the company. It was also resolved that his name should be entered in the company's register of shareholders as the holder of 2,000 shares. At the same meeting the following resolution was passed: "That the letter addressed to Mr. Mendel by the company engaging to pay him the sum of £4,000 in consideration of his services be signed by the secretary of the company and handed to Mr. Mendel." On the same day this letter was handed to Mendel. It was as follows:—

"Dear Sir,—By a minute of the board passed at a meeting held this day it has been agreed to pay you the sum of £4,000 in consideration of the services rendered by you in connection with this company. This sum is to be paid by a draft or drafts to be drawn by you on and accepted by the company, payable twelve months after date, and to be 238] dated on the day when you shall \*have paid in full for the whole of the 2,000 shares of the company which have been subscribed for by you. Yours faithfully,

"(Signed) E. M. Fraser, Secretary."

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A few days afterwards Mendel's name was entered on the company's register of shareholders as the holder of 2,000 shares on which nothing had been paid. On the 6th of March, 1876, the board of directors passed a resolution that Mendel be called upon to pay £10,000, part of the amount payable upon the 2,000 shares agreed to be taken by him and to be paid in full, the same being required for the purposes of the company.

On the 8th of March, 1876, the secretary of the company

wrote the following letter to Mendel:-

"Dear Sir,—The directors desire me to request that you will be good enough to remit within ten days from this date the sum of £10,000 in respect of 1,000 of the 2,000 paid-up shares to be subscribed for by you under your agreement with the company of the 4th of January last. The directors desire me further to state that it is probable the balance will be required in the course of two months.

"I am, dear Sir,
"Yours faithfully,
"(Signed) E. M. Fraser, Secretary."

On the 16th of March Mendel wrote the following letter, addressed to the directors of the company:—

"Gentlemen,—Yours of 8th inst. came here to hand, and I had made my arrangements to pay you to-morrow £10,000 against 1,000 shares paid up of your company to be taken by me. I have been advised not yet to take up any shares as long as the transfer of the concession to you is not entirely settled. The concession is, as I am informed, transferred to you, but that transfer is not ratified by the Russian Government by the sanction of your company as necessary. It is absolutely wanted that the municipality of Odessa applies in St. Petersburg for that ratification or admission of the English company. Without this your company has no legal existence nor any rights in Russia. I hear this formality won't take long time to be obtained. I hope to be in \*the opportunity to discuss matters [239 verbally with you in a few days.

"I am, Gentlemen,
"Yours faithfully,
"(Signed) A. Mendel."

Further correspondence ensued, in the course of which Mendel said that he could not consider himself any longer bound to take up shares in the company, and he declined to pay the £10,000.

On the 9th of May, 1876, the company commenced this action. They alleged in their statement of claim that on the 8th of March, when they called for the £10,000, they required it for the purposes of their undertaking, and that they had been unable to proceed with it, and had been seriously injured by reason of the defendant repudiating his part of the agreement. They claimed specific performance by the defendant of his part of the agreement of the 4th of January, 1876, or damages to the amount of £20,000.

4th of January, 1876, or damages to the amount of £20,000. By his statement of defence Mendel alleged that the agreement of the 4th of January, 1876, and the resolution of the board of the same date as to the payment of £4,000 to him for his services, really formed in effect one agreement for the issue of shares to him at a discount of 20 per cent., and that he had never rendered any services to the company. The agreement was never sanctioned by a general meeting of the company, and was therefore ultra vires and void. He also said that it was a condition precedent to his subscribing for shares that the company should be in a position at once to proceed with the construction of the first section of the tramways, and this they could not do because they had not obtained the license of the Russian Government to trade in Russia. The defendant also alleged that when the call was made on him the application was not made bona fide, that the money was not really required for the purposes of the company, that the company had proved a complete failure, and that there was no hope of their ever carrying out the purposes for which it had been formed. By way of counter-claim he asked to have his name removed from the company's register of shareholders.

The plaintiffs, in their reply, denied that the application to the defendant was not bona fide, and said that the com-240] pany had \*proved a commercial failure in consequence

of the defendant not performing his agreement.

The action was tried before Mr. Justice Fry on the 18th

of June. 1877.

Cookson, Q.C., Kemp, Q.C., and J. C. Mathews, for the plaintiffs: The defendant has shown no reason why the

agreement should not be performed.

North, Q.C., Romer, and F. H. Lewis, for the defendant: In the first place, the two agreements were really one arrangement for the issue of shares at a discount. It was divided into two agreements for the purpose of evading the prohibition of clause 10 of the articles of association. No services had been rendered by the defendant to the company; the £4,000 was really a discount from the price of the

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shares. The whole arrangement was ultra vires, and the court will not enforce the performance of a part of it.

[FRY, J., referred to Wilkinson v. Clements (1).]

When the agreement is really one, the court will not be blinded by merely a colorable separation. The evidence shows that there was one agreement that he should take the shares at an abatement of price, and this agreement was afterwards carried into effect by the two separate agreements. The object of the separation was to avoid difficulties with the shareholders, to avoid showing on the minutes that the directors were doing what they were not authorized to do. They might be acting in good faith, though they were attempting to do that which was ultra vires.

Secondly. The obtaining of the sanction of the Russian Government was a condition precedent to the requiring payment of the money. The money was to be called for only when required for the purposes of the company, and those purposes could not be effected until the sanction of the Rus-

sian Government was given.

Thirdly. The directors were not authorized to make calls in this way on one shareholder alone. All the shareholders must be treated alike. Clause 37 of the articles does not

justify the making of this call.

\*Cookson, in reply, upon the question of the valid- [241]ity of the agreement only: The two agreements are several in form as well as in the mode in which they are to be carried out. The bills for the £4,000 are not to be accepted until the defendant has paid up the whole of the £20,000 for the shares, and then they are not to be payable for a year. This interval of time prevents the agreement, if it is one, from being an agreement for the issue of shares below par. We are only asking now for the payment of £10,000. Moreover, clause 10 of the articles only imposes a restriction on the powers of the directors. It is the company who are now seeking to enforce the agreement. The defendant, who was aware of the restriction, cannot take advantage of an agreement ultra vires the directors, and he cannot The company may adopt repudiate his own agreement. the agreement by the defendant to take the shares, and he not bound to show that the defendant rendered services to the company.

FRY, J.: The construction of the agreement does not appear to me to be open to any difficulty. Mr. Mendel agrees immediately to subscribe for 2,000 shares. He agrees to

<sup>(1)</sup> Law Rep., 8 Ch., 96; 4 Eng. R., 782.

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take up and pay for those shares in full, in such numbers and at such times as shall be required for the purposes of the company. Now I think that, at any rate prima facie, the persons who are to determine whether the shares are required to be taken up for the purposes of the company are the managing body, the directors of the company. the next clause of the agreement gives Mr. Mendel the option of taking 15,000 further shares at par at certain specified times, and it gives the company the right of disposing of any of those shares which he may not take up at those times That carries with it, in my opinion, a clear respectively. obligation on the part of the company to retain a sufficient number of shares to answer the option up to the respective times at which it is to be exercised; and afterwards they may dispose of them. The considerations for the agreement are abundant on each side. And then, by the third clause, the agreement gives to Mendel the option of pay-242] ing for the \*15,000 shares in full, if he so thinks fit, or of paying "such an amount in respect of such shares as shall be then called up in respect of each of the other shares issued by the company," if he prefers that mode of

[His Lordship then referred to the resolution of the 4th of January, 1876, the entry of Mendel's name on the register, and the resolution of the 6th of March, 1876, and con-

tinued:

There was, therefore, a conclusion come to by the proper persons that £10,000 was required for the purposes of the company. It has been suggested that it was not really so required, but that suggestion does not prevail with me, because it appears that the company were proceeding or were intending to proceed with their works at Odessa, and they might well, therefore, require the sum of £10,000 for that purpose. It is not proved to my satisfaction that the company had abandoned the intention of carrying their works into effect. I therefore come to the conclusion that the money was really required for the purposes of the company, and there is certainly nothing to induce me to conclude that they passed this resolution mala fide.

Mr. North and Mr. Romer have argued three points before me with regard to the agreement. The first point arises on the 10th clause of the articles of association of the company. It is said that the letter of the 4th of January, 1876, from the secretary of the company to Mr. Mendel, by which the company agreed to pay him £4,000 in consideration of services rendered by him in connection with the company, was

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written contemporaneously with the agreement, and it is said by Mr. Mendel that he had never rendered any services to the company, and for aught I know that statement may be He says, further, that this letter was written in pursuance of an arrangement or an agreement between him and the directors of the company that they should in effect collude together for the purpose of making a bargain in itself bad, because it violates the provision of the 10th clause of the articles of association that shares should not be issued at a discount, while at the same time it should appear to be good, and by which Mr. Mendel should get £4,000 from the company as payment for services rendered, when he had, in fact, never rendered any service whatever to the company. That was the arrangement which he says \*he came to [243] with the chairman of the company, and his counsel have asked me to conclude upon the evidence that this arrangement was adopted by the other directors of the company. Now I am bound to admit that the collocation, in point of time, of the two transactions affords very great color to the argument, and I will assume, for the purposes of my judgment, that Mr. Mendel's counsel are right in so arguing. And it appears to me that it may very well follow from that that the directors may be advised that the letter of the 4th of January, containing, as Mr. Mendel now alleges, a misstatement of facts, cannot give rise to any legal obligation on the part of the company, and that Mr. Mendel may find that he will never be entitled to the bills for £4,000, or to payment of those bills if they are issued. That may or may not be the case, and I say nothing more about it now.

But the present question is whether I can listen to Mr. Mendel's assertion that he has colluded with the agents of the company for the purpose of defrauding the company. I say "defrauding the company," because it is a fraud on the company to agree that he should receive £4,000 for services rendered to the company, if he never rendered any services at all. I am asked to hold the two agreements, viz., the one contained in the letter of the 4th of January, 1876, and the other in the formal agreement of the same date, to be parts of one and the same transaction in order that Mr. Mendel may say that they are ultra vires the directors. decline to do that. I think that where a transaction, taking it in its entirety, would be bad, but the agent of one of the parties to it has colluded with the other party for the purpose of putting the agreement into such a form that the valid part shall be separated from the invalid part, then that which is *intra vires* may be separated from that which

is ultra vires: in other words, that which is honest and true may be separated from that which is dishonest and false, and the principal of the agent who has been party to the fraud may say to the other party whom he sues, "You have agreed that that which was originally commenced as one negotiation shall result in two separate agreements, and vou having so agreed, I will now take you at your word, and I will enforce so much of the agreement as is contained 244] in the valid separate document upon which \*I sue, and I will leave the other part of the agreement alone. That seems to me to be the true view of the course of conduct which Mr. Mendel says he has pursued, if it is looked at with regard to the doctrine of ultra vires independently of fraud. But the case appears to me to be still stronger when the defendant himself comes forward and says, "I colluded with your agent when he agreed that you should pay me £4,000 upon a false and fraudulent representation that services had been rendered to you by me, when in fact none were rendered." And I think that as against the person who sets that up as the real history of the transaction. I ought to separate the rest of the agreement from the fraudulent and false part of it, and allow the principal with whose agent the defendant has fraudulently colluded to enforce the performance of that separate part of the agreement.

I think, too, I might well come to the same conclusion, irrespective of the principles applicable to the doctrine of ultra vires and to fraud, and for this reason, that where it is apparent on the face of even a single agreement that the parties intended that it should be carried into effect piecemeal, then a default in the performance of one part of the agreement is no defence to an action for the specific performance of another part. I find a negotiation which is said to have been commenced for one agreement, and that the parties have agreed to separate it into two distinct parts, and I infer that they have done so for the good and valid reason that they desired that the one part should be enforceable even if the other was not. Even upon that ground, irrespectively of the doctrines of ultra vires and of fraud, I think I may properly and rightfully enforce the one part of this agreement without attending to the objections raised to the other part, viz., that which is embodied in the letter of

the 4th of January.

Two other observations may be made with the view of strengthening the conclusion at which I have arrived—that the one part of the agreement may be treated separately from the other part. The first is that the £4,000 is not to be

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paid until twelve months after the £20,000 has been paid. The other is that the £4,000 may never become payable at all, because it is quite possible that the whole of the £20,000 may never be called for, and in that \*case the £4,000 [245 will never become payable. According to the argument of Mr. Mendel's counsel, if the £20,000 is not required for the purposes of the company, it can never be called up, and therefore a state of circumstances may arise in which the directors will not have power to call up the £20,000, and the £4,000 may therefore never become payable. These observations appear to me to confirm the conclusion at which I have arrived independently of them.

The second objection urged by Mr. Mendel's counsel was this—that it was a condition precedent to his subscribing for the shares that the company should be in a position at once to proceed with the construction of the first section of the tramways. I asked Mr. North whether he put that as the result of the construction of the agreement, and, if I understand him rightly, he said that, looking at the surrounding facts, he did. He said that the company may never be able to hold the concession, or to carry into effect their objects, unless they obtain the consent of the Russian Government. But I am clearly of opinion that the obtaining of the consent of the Russian Government is not a condition precedent to the payment of the £20,000. If anything could show that more plainly than the silence of the agreement, it

would be this, that the £20,000 may be required for the

very purpose of obtaining that consent which is said to be a condition precedent to the payment of the £20,000.

Then the third objection was this: that the agreement puts the defendant upon special terms with regard to the times at which he is to pay up the £20,000, and, to use Mr. North's language, all the shareholders must be treated alike with regard to calls. It appears that the other shareholders have not had calls made upon them, and therefore it is said that no call can be made upon Mr. Mendel. But the 37th clause of the articles of association enables the board of directors to agree with a particular shareholder to put him in a different position from the other shareholders with regard to the amount of calls, and the times at which they are to be paid. Mr. Mendel has agreed to pay the calls upon the 2,000 shares in full, "in such numbers and at such times as shall be required for the purposes of the company." \*That appears to me to be completely justified by [246 the 37th clause of the articles.

My judgment, therefore, is that the defendant do specifi-25 Eng. Rep. 32 1878

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cally perform the agreement of the 4th of January, 1876, so far as it remains to be performed by him, and that he do pay the costs of the action.

From this decision the defendant appealed. The appeal

came on to be heard on the 22d of February, 1878.

North, Q.C., and Romer, for the appellant: The two agreements were parts of one arrangement, and cannot be separated; and as one part was ultra vires the other part cannot be enforced.

[James, L.J.: We are all of opinion that the two agreements are separable. They were intended by the parties to

be separated, and they must be so dealt with.]

Then we contend, secondly, that it was a condition precedent to the defendant subscribing for the shares that the plaintiffs should obtain the license of the Russian Government. The money was not to be called for until it was required for the purposes of the company. The plaintiffs have not shown that it was so required, and, indeed, it could not be required until the license of the Russian Government was obtained. The plaintiffs themselves admit in their reply that the company is a commercial failure.

Thirdly, if the money was wanted for the purposes of the company the directors were not authorized to make calls upon one shareholder alone, nor to call on the appellant to pay the whole on some shares and nothing on others.

Cookson, Q.C., and J. C. Mathews, for the plaintiffs, on the question whether the defendant could raise the objection that the money when called for by the directors was required for the purposes of the company, referred to Foss v. Har-

bottle(').

James, L.J.: In my opinion the appeal cannot be sup-247] ported. The defendant \*entered into an agreement, which was very specific, that he would subscribe for 2,000 shares, and that he would take them up in such numbers and at such times as should be required for the purposes of the company. After that agreement the directors could not allot the 2,000 shares to any one else. They were in fact allotted to him. Then, he having agreed to take them up in such numbers and at such times as should be required for the purposes of the company, the directors call up some of them for the purposes of the company. The only defence which he could make to that call would have been that the call was made mala fide. That defence is not raised in the present suit. There is no evidence in support of such a case.

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We cannot in this suit try the question whether the directors asked more than they wanted, or whether they wanted to use it in this way or the other. We cannot try whether that money was really wanted for the purposes of the company. It is similar to the cases, in which we always refuse to interfere, where the question is raised whether land proposed to be taken by a railway company is really required for the purposes of the company. The court cannot in such a case enter into a contest with the engineers whether the land is required or not. That must be decided by the proper authorities who are intrusted with the management of the company. It is incumbent on the other side to show want of bona fides. In the same way, in the present case, the defendant has agreed to subscribe for the shares when the money was wanted by the company, and we cannot try whether it is really wanted; we must take the decision of the directors. It was open to the defendant to raise the defence of want of bona fides, but that defence is really not raised in this case. The appeal must be dismissed with costs.

BAGGALLAY, L.J.: I at first felt some difficulty as to the question whether the defendant ought to have been on the list of shareholders at all; but that issue is not raised in this suit. I therefore see no reason to differ from the deci-

sion of Mr. Justice Fry.

THESIGER, L.J.: I also agree that the appeal must be The reason \*given for the agreement with the defendant was that the directors were not able to get the shares taken by the public in open market, and for that consideration the defendant agreed to take 2,000 shares, and to pay the money whenever the directors called on him to do so for the purposes of the company. They have called on him to pay it, and he is bound to pay it unless he can show mala fides. In the case of land required for a railway company, the court cannot go into the question whether all the land is really required by the company, it must trust to the certificate of the engineers. So here, if the company say that the money is required for the purposes of the company the defendant must pay, unless he can show by actual proof that the money was not required. No such proof has been given in this case, and if the facts were gone into it would very likely turn out that it was really required.

Solicitor for plaintiffs: H. C. Godfray. Solicitors for defendant: Lewis & Lewis.

## [8 Chancery Division, 248.] C.A., March 7, 1878.

### Ex parte GILBEY. In re BEDELL.

Composition—Surety—Default in Payment—Payment in part by Surety—Rights of Creditors and Surety—Election—Proof in Baukruptcy—Protected Transaction—Notice of Act of Bankruptcy "available for Adjudication"—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 11, 94, 95.

Where creditors agree to accept a composition payable in instalments, some of which are guaranteed by a surety, if default is made in the payment of any one instalment the creditors have a right to sue the debtor, or to prove in his bankruptcy, for the balance of their original debts, after deducting what they have received, either from the debtor or the surety, in respect of the composition, and not merely for the amount of the unpaid instalments of the composition.

And the surety, though he is entitled to prove in the debtor's bankruptcy for what he has paid in respect of the composition, has no right to put the creditors to an election whether they will carry out the composition arrangement in toto or reject

it in toto.

The words "notice of an act of bankruptcy available for adjudication" in sects. 94 249 and 95 of the Bankruptcy Act, 1869, mean notice of an act of \*bankruptcy which would have been available for the making of the adjudication actually made, that is, an act of bankruptcy committed within six months from the presentation of the petition on which the adjudication was founded.

This was an appeal from a decision of Mr. Registrar

Pepys, acting as Chief Judge in Bankruptcy.

On the 19th of October, 1874, Charles Bedell filed a liquidation petition. The creditors at their first meeting, on the 17th of December, 1874, resolved to accept a composition of 7s. 6d. in the pound in satisfaction of the debts, payable as follows: 4s. in three months, 2s. in six months, and 1s. 6d. in nine months from the date of the registration of the resolution, the last instalment to be guaranteed by H. P. Gil-The composition was to be secured by the promissory notes of the debtor, to be dated on the day of the registration of the resolution, and to be delivered by the debtor to James Glegg for distribution among the creditors. payment of the composition the debtor was to carry on his business under the inspection of three persons who were appointed inspectors, and a deed of inspectorship was to be prepared. On the 21st of December, 1874, Gilbey executed a guarantee in the following terms: "In consideration of the creditors of the above named debtor passing an extraordinary resolution to accept a composition of 7s. 6d. in the pound in satisfaction of the debts due to the creditors from the said debtor, and that such composition be payable as follows: 4s. in the pound within three months from the date of the registration of the resolution, 2s. in the pound within six months from the date aforesaid, and 1s. 6d. in the pound

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within nine months from the date aforesaid, I agree to guarantee the due payment of the last instalment of such composition to Mr. James Glegg for the use of and to distribute to the several creditors." The resolution was confirmed at the second meeting of the creditors on the 31st of December. 1874, and was registered on the 26th of January, 1875. inspectorship deed was executed on the 8th of March, 1875. It contained (inter alia) a proviso that, if Bedell should make default in payment of his promissory notes respectively as and when they should become payable, it should be lawful for the inspectors to apply to the Court of Bankruptcy to adjudge him a bankrupt, and that, in the event \*of his being adjudicated a bankrupt, before full [250] payment of all the promissory notes, Gilbey should thereupon stand released from his guarantee. The deed was executed by some of the creditors. The first instalment of the composition was paid by Bedell when it became due, but he made default in payment of the second. On the 1st of October, 1875, two creditors, who were not bound by the composition, because their names had not been inserted in the debtor's statement of affairs, and who had not executed the inspectorship deed, presented a bankruptcy petition against him, founded on his non-compliance with a debtor's summons, and he was, on the 14th of October, 1875, adjudicated a bankrupt. After the adjudication the bankrupt made default in payment of the third instalment of the composi-Glegg then called upon Gilbey to pay it. Gilbey declined to pay, on the ground that, by virtue of the proviso in the inspectorship deed, he was released by the bank-ruptcy of Bedell. The Queen's Bench Division, however, decided that the proviso applied only to a bankruptcy procured by the inspectors under the provisions of the deed, and that Gilbey was not released, Glegg v. Gilbey ('), and this decision was affirmed by the Court of Appeal (2). Gilbey then paid the third instalment, and afterwards tendered a proof in the bankruptcy for the amount which he had thus Some of the creditors who were parties to the composition resolutions also tendered proofs in the bankruptcy for the balances of their original debts, after deducting what they had received in respect of the first and third instal-ments of the composition. The trustee rejected Gilbey's proof, on the ground that, at the time when the bankrupt's liability to indemnify him was contracted, Gilbey had notice of the act of bankruptcy committed in the filing of the (1) 2 Q. B. D., 6; 19 Eng. R., 190. (9) 2 Q. B. D., 209; 20 Eng. R., 281.

liquidation petition, and was therefore, by sect. 31 of the The Court Bankruptcy Act, 1869, prohibited from proving. of Appeal, however, held that this notice was not a bar to the proof, because the act of bankruptcy, having been committed more than six months before the presentation of the petition on which the adjudication was made, was not "available" for the making of that adjudication, and held that Gilbey's proof must be admitted: Ex parte Crosbie ('). 251] Gilbey then applied to the Court of Bankruptcy \*for an order directing the trustee not to admit a proof tendered by D. H. Young for £401 2s. 4d. (being the balance of the full amount of a debt alleged to have been due to Young by the bankrupt on the 19th of October, 1874, after deducting the amount of 4s. in the pound and 1s. 6d. in the pound received by Young as instalments of the composition), but only to admit the proof for such smaller amount and upon such terms as the court should direct and as should be just. The Registrar dismissed the application with costs.

Gilbey appealed.

De Gex, Q.C., and Crump for the appellant: It is true that on default being made in payment of any one instalment of a composition the right of a creditor to sue the debtor for his original debt revives, but it revives only at the election of the creditor, and he must elect to abide by the composition arrangement in toto or to reject it in toto. he elects to retain the instalments which he has already received, he can only sue the debtor (or prove in his bank-ruptcy) for the amount of the unpaid instalments. That the creditor is put to this election is shown by the observations of Lush J., in Glegg v. Gilbey (\*). If the composition resolutions are only a conditional accord and satisfaction, still a creditor who had received promissory notes for instalments of the composition, and who afterwards claimed to be paid in full, would have to deliver up the promissory notes: Ex parte Charlton (\*). If, on the default in payment of the second instalment, a creditor had sued the debtor for his original debt, less the first instalment, that would have discharged the surety. The surety gave the guarantee only on the faith of the arrangement being carried out in its entirety. He is entitled now to say, non in hac fadera veni.

[James, L.J.: What interest has the debtor or his estate

in this question?

BRETT, L.J.: The logical result of your argument is, that the third instalment ought to be paid back to the surety.

<sup>(1) 7</sup> Ch. D., 123; 23 Eng. R., 457. (2) 2 Q. B. D., 13; 19 Eng. R., 190. (3) 6 Ch. D., 45, 53.

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JAMES, L.J.: There is no ground for attributing any one instalment to any particular part of the debt.]

\*Ex parte Ellis(') and Latter v. White('), are au- [252]

thorities in favor of our argument.

Moreover, the creditors who received the first instalment from the debtor received it with notice of the act of bankruptcy committed in the filing of the liquidation petition, which was within twelve months before the order of adjudication. Consequently, the title of the trustee relates back to it: Bankruptcy Act, 1869, s. 11: and the first instalment ought to be refunded to the trustee. Sects. 94 and 95 do not protect the payment, for there is no reason for limiting the meaning of the words "notice of an act of bankruptcy available for adjudication," as they were limited with reference to sect. 31 in Ex parte Crosbie (\*), to an act of bankruptcy committed within six months before the presentation of the petition on which the actual adjudication was made. ratio decidendi of Ex parte Crosbie does not apply to the present case. If, in sect. 31, the limit of six months was not imposed, there would be no limit at all; but sect. 11 carries back the title of the trustee only for twelve months from the order of adjudication. There is, therefore, no reason for reading the words "notice of an act of bankruptcy available for adjudication," in sects. 94 and 95 in any other than their natural sense, that is, as meaning an act of bankruptcy available for adjudication at the time when the payment was received by the creditor. The same words may well have a different meaning in different sections of the act: Ex parte

Winslow, Q.C., and Northmore Lawrence, for the trus-

tee; and

H. W. Lord, for Young, were nor heard.

James, L.J.: I am of opinion that the decision of the Registrar must be affirmed. With regard to the construction of the words "notice of an act of bankruptcy available for adjudication," in sects. 94 and 95, I think we must construe them in exactly the same way as we did in favor of Mr. Gilbey in our former decision in Ex parte Crosbie with reference to sect. 31, i.e., as meaning an act of \*bank-[253 ruptcy which would have been available for the making of the adjudication which has been actually made. We held that, where the adjudication had not been made for more than six months after the commission of an act of bankruptcy, that act of bankruptcy was not one "available for

<sup>(1) 2</sup> Mont. & A., 870.

<sup>(\*) 7</sup> Ch., 128; 28 Eng. R., 457.

<sup>(\*)</sup> Law Rep., 6 Q. B., 474.

<sup>(4)</sup> Law Rep., 9 Ch., 383; 8 Eng. R., 922.

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adjudication" within the meaning of sect. 31. There the question was as to the right to prove against the bankrupt's estate, and I think the same principle must apply to an attempt to recover back money paid by the bankrupt under the composition arrangement. I see no reason for applying

a different rule of construction now.

With regard to the main question, the right of a creditor to prove for the whole amount of his original debt, less what he has actually received, I cannot understand how, upon any legal principle, that right can be questioned. question now to be determined is not one between Mr. Gilbey and the creditors; that question was settled in a dis-The question which now arises is one between the creditors and the bankrupt's estate. We have not now to deal with any right of Mr. Gilbey as surety, but with his right as a creditor of the bankrupt. It has been decided over and over again that a mere agreement for a composition is not an accord and satisfaction of the debts, unless it is expressly provided that it shall be. In order to defend an action by a creditor for his debt, the debtor is bound to show that the composition was paid, or that he was ready and willing to pay it at the time appointed. If he cannot do this, the creditor's right to sue him for the original amount of his debt revives. If the right of action is unaffected, how can the right of proof, which is commensurate with the right of action, be diminished? Of course, the creditor who seeks to prove must give credit for whatever he has received, but it can make no difference that he has received it in respect of a composition. In whatever mode he has received it he must give credit for it. But, if default is made in payment of the composition, the creditor's legal right revives to sue for the whole sum originally due to him, less what he has in fact received...

BRETT, L.J.: Upon the main question the case stands thus: A composition agreement is made between a debtor 254] and each of his creditors that \*if the debtor will, at three specified times, pay three specified sums of money to each of his creditors, and the other creditors will agree to accept those payments, the original debt shall, if the conditions be fulfilled, be released. It has been held over and over again that, if there is nothing more than this, the agreement does not amount to an accord and satisfaction by the creditor, and that, if the debtor fails to pay any instalment of the composition, the right of the creditor revives to sue for his original debt, less what he has received in respect of it. If there were no surety it would be clear that the cred-

itor would be entitled to prove in the bankruptcy for the whole amount of his original debt, less what he has received. But a surety is brought into the arrangement, and he undertakes to pay the third instalment of the composition in case the debtor does not. The surety has paid the third instalment, and it is said that the contract with him will be altered if the creditors are now allowed to prove for what remains unpaid of their original debts. It seems to me, however, that the surety must be taken to have contracted subject to the known rule of law by which, if the debtor fails to pay the composition, the creditors are remitted to their old debts. The surety has contracted, subject to that rule of law, that, if the debtor does not pay, he will do so, and I cannot see that his position or the consideration for which he undertook to pay will be in any way altered. Upon the other point I have nothing to add to what the Lord Justice has said.

THESIGER, L.J.: I am of the same opinion. This is not a case where the surety has contracted to pay 1s. 6d. in the pound in consideration of the creditors agreeing to accept the debtor's promise to pay 7s. 6d. in the pound. But the contract is, that, in consideration of the creditors passing a certain resolution to accept a composition of 7s. 6d. in the pound payable in three instalments, the surety guarantees the payment of the last instalment. In order to see what the consideration for the guarantee is, we must look at the resolution. It is an ordinary composition resolution, and it provides for the payment of the composition in three instalments, and that the arrangement should be carried into effect by a deed. As incident to that arrangement there was implied that which is always \*implied in such [255] cases, that, in the event of any one instalment not being paid when it became due, the original debts should revive. The consideration for the guarantee is equally fulfilled by the passing of the resolution, even if default is made in pay-So long as the creditors give credit for the sums which have been actually paid to them, whether by the debtor or by the surety, there is nothing of which the surety has a right to complain. But, independently of that, I think that the question which is now raised ought to be raised, if raised at all, in the form of a claim by the surety to recover back from the creditors what he has paid them, and I cannot see that he has any right to prevent them from proving against the bankrupt's estate. And if that be so, it must be competent to them to say, "We have received certain sums in respect of our debts, for which we are willing to give 25 Eng Rep.

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credit," and the present application is really to prevent them The decision in Glegg v. Gilbey (') was from doing that. that this bankruptcy was not such a one as, by the terms of the inspectorship deed, released the surety from his liability, and it seems to me to follow almost as a corollary from that decision, that the surety cannot have a right to recover back from the creditors that which he has paid them; a fortiori, he has no right to prevent them from proving in the bankruptcy for the whole amount of their original debts, less what they have received in respect of them.

The appeal was dismissed, with costs.

Solicitor for appellant: V. I. Chamberlain.

Solicitors for trustee: Lewis, Munns & Longden. Solicitors for creditors: Sorrell & Son.

(1) 2 Q. B. D., 18; 19 Eng. R., 190.

Where, on a compromise, the creditor stipulates that if payment of the less sum agreed upon be not made according to the terms of the compromisehe shall be entitled to demand the entire indebtedness, a failure to make punctual payment entitles the creditor to go at once for the original indebtedness: Thompson v. Hudson, L. R., 4 H. L., 1; Penniman v. Elliot, 27 Barb., 315; Hill v. Rutherford, 9 Grant's (U. C.) Chy., 207; Warburg v. Wilcox, 1 Hilton, 118.

The rule is the same in a bankruptcy

composition: Evans v. Gallantine, 57 Ind., 367, 3 Southern L. Rev., N.S.,

And accepting a mortgage for part, after such default, is not a waiver of his right to do so: Thompson v. Hudson, L. R., 4 H. L., 1.

But see Penniman v. Elliot, 27 Barb..

Though if the debtor assign property to a trustee for creditors, a failure by the trustee will not revive the debt: Campbell v. Im Thurn, 1 Com. Pl. Div.,

[8 Chancery Division, 256.]

C.A., March 8, 1878.

\*In re Marman's Trusts. 2561

Maintenance of Pauper Lunatic-Jurisdiction-Payment to Legal Personal Representative of Lunatic-16 & 17 Vict. c. 97, ss. 94, 104.

M., a pauper lunatic in an asylum at Bethnal Green, but not found lunatic by inquisition, became entitled to a small fund in court. An order was made in 1856 on petition under the Trustee Relief Act, by M. by his next friend, directing that he should continue at the asylum until further order, and, the guardians of the poor of his parish undertaking to maintain him there, that £31 a year should be raised out of the fund and paid to the guardians in repayment of the sums to be expended in his maintenance. In 1859 he was removed to the new asylum for his county by order of the justices, but without any order of the Court of Chancery. From this time no payments were applied for by the guardians. He remained in the county asylum till his death in 1875. His legal personal representative petitioned for transfer of the funds in court to him. The guardians appeared and claimed maintenance for the past time :

Held, that the guardians could not claim maintenance under the order, which

ceased to be operative on the lunatic's removal to a fresh asylum:

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Held, also, that any claim for maintenance independently of the order was merely a debt of the lunatic, payable by his personal representative in due course of administration, and that the court had no jurisdiction in the matter to order payment of it, but that the whole fund must go to the personal representative.

In 1844, John Moore, a person of unsound mind, not so found by inquisition, and being a pauper chargeable to the parish of Brighton, was, under an order of justices, placed in the lunatic asylum of Warburton & Co. at Bethnal Green.

In 1855, Moore having become entitled to a fund which had been paid into court under the act for the relief of trustees by the executors of Mary Marman, a petition was presented in his name by his next friend, upon which, on the 14th of November, 1855, an order was made for payment to the treasurer of the guardians of the poor of Brighton of a sum of money for the past maintenance of Moore, and an inquiry was directed what provision ought to be made for his future maintenance out of the residue of the fund. After the payments directed by this order the fund was £436 15s. 5d. consols.

By an order made on the 25th of July, 1856, it was ordered that Moore should continue in Warburton's asylum till further \*order, and, the guardians of the poor of Brighton consenting thereto and agreeing to maintain and clothe Moore at the said asylum at the annual charge of £31 4s., it was ordered that £31 4s. should be allowed for his maintenance and clothing for the year ending the 25th of June, 1856, and that the yearly sum of £31 4s., from the 25th of June, 1856, should be allowed for his future maintenance and clothing during his life, or until further order. tions were given for payment of the £31 4s. for the past year, and the costs, out of the fund; and, the guardians consenting, it was ordered that on or after the 25th of June, 1857, and on or after the same day in each succeeding year during the life of Moore, or until further order, so much of the residue of the consols from time to time standing in trust in the matter, as with any cash arising from dividends thereon, would be sufficient to raise £31 4s., should be sold, and that the moneys to arise from such sales should be from time to time paid to the treasurer of the guardians for the time being in repayment of the sums to be expended in the maintenance and clothing of Moore.

Moore continued at Warburton's asylum till 1859, when he, along with a number of other pauper lunatics from Sussex, was by order of two justices of the county of Sussex, under the powers given by 16 & 17 Vict. c. 97, s. 77, but without any order of the Court of Chancery, removed to the new Sussex County Asylum at Hayward's Heath, where he remained till his death, which took place in March, 1875. While there he was maintained at a less expense than £31 4s. a year.

The order was acted upon down to August, 1858, when the guardians received maintenance down to June, 1858.

After this no payment was received by the guardians.

After the death of Moore his personal representatives petitioned for transfer and payment of the funds in court, amounting to £355 14s. 2d. consols, and £187 14s. cash. The guardians, who were served with the petition, asked for payment of what they had expended on Moore's maintenance since June, 1858. Vice-Chancellor Bacon, on the 2d of August, 1876, directed taxation, and payment out of the fund, of the costs of both parties, and ordered transfer and payment of the residue to the petitioner. The guardians appealed.

258] \*Swanston, Q.C., and Walter Renshaw, for the appellants: The spirit and object of the order of 1856 were that maintenance out of this fund up to a given amount should be allowed to the guardians, and if the insertion of the words "or at such other asylum as the justices shall direct" had been asked for, they would have been inserted as a matter of course. The court is not bound to construe the order so strictly as to defeat its object. At all events, under 16 & 17 Vict. c. 97, ss. 94, 104, we are entitled to have

the amount repaid which we have expended.

Hemming, Q.C., and Freeman, contrà: The order of 1856 was an order for payment of the expenses of keeping the lunatic at a specified asylum approved of by the court. We do not say that there was any contempt in not applying to the court to sanction the removal of the lunatic, but we say that the order was put an end to by such removal. The claim for a quantum meruit is better founded, but cannot be brought forward here; it is a mere claim for a debt against the legal personal representative. There is no lien, and a creditor could in no case recover more than six years' arrears; and in the case of such a claim by guardians of the poor, the period of limitation is still shorter. The nature of the jurisdiction of the court over property of persons of unsound mind is very clearly explained in Beall v. Smith (1). The owner being incapable of managing his own property, the court authorizes the trustee to deal with it for his benefit, but a creditor cannot apply to the court to be paid out of it, and when the lunatic dies the power of the court ceases,

<sup>(1)</sup> Law Rep., 9 Ch., 85; 8 Eng. R., 749.

because the necessity for it ceases. The principle is shown in Re Upfull's Trusts (').

Even if a debt exists, the court will not deal with it in the matter, but will leave the creditor to make his demand against the legal personal representative in the ordinary way.

Swanston, in reply, referred to Vane v. Vane (2).

JAMES, L.J.: I am of opinion that, with the exception of the trifling amount \*which had become payable but [259] was not received under the order of July, 1856, before Moore was removed, the order of the Vice-Chancellor is right. Counsel for the appellants have rested their case partly on the order, partly on a quantum meruit. But a case cannot be pieced together in this way. The appellants cannot establish a right under the order, for the order was to pay £31 4s. which the court considered a proper sum to be allowed for the maintenance of the lunatic in a particular asylum; and the order came to an end when he was removed, just as it would have come to an end if he had recovered, or if a friend had taken him to his house. The guardians did not take any steps to get a new order applicable to the altered circumstances of the case, and were guilty of just the same kind of laches as if they had never sought for any order at all. We cannot make any such order, because it was not applied for while the court had jurisdiction to make it. At the death of the lunatic the money belongs absolutely to his legal personal representative, who will be liable to pay what is legally due for the lunatic's maintenance, just as he is liable to pay any other of the lunatic's debts. The demand of the guardians must be recovered like any other debt, in a due course of administration. It is no charge on the assets, and we cannot make it a charge merely because the guardians might in due time, if an application had been made, have obtained a charge.

COTTON, L.J.: The question is, whether the Vice-Chancellor was right in directing payment to the lunatic's legal personal representative of a sum to which the lunatic was absolutely entitled. How is the right of the representative interfered with? It is said that under an order of the 25th of July, 1856, certain sums were payable out of the fund to the appellants. I should be sorry to decide on a mere technicality, but this order was made with reference to the maintenance of the lunatic, and it was ordered that he should remain at a particular asylum, the yearly expense of his maintenance at which was £314s., and that £314s. should be allowed for his maintenance. As a matter of construc-

<sup>(1) 3</sup> Mac, & G. 281.

<sup>(9) 2</sup> Ch. D., 124; 16 Eng. R., 710.

tion that must be taken to mean for his maintenance while residing there. It was not intended by this order to recoup 260 the guardians generally \*for his maintenance, but to allow what they should expend upon him at this particular asylum. We cannot give maintenance at another asylum now, on the ground that the court, if asked at the time of the lunatic's removal, would have done so. It probably would have done so, but as things now stand, how are we to interfere with the right of the administrator? The lunatic is dead, and we are not now asked to deal with the fund for his benefit, on the ground that he, though living, is unable to deal with it himself. We are asked to interfere with the right of his personal representative, who is capable of dealing with it, and I know of no case in which the court after the death of a lunatic has interfered with the rights of his personal representative by paying debts or otherwise. In my opinion we have no jurisdiction to make such an order as is asked.

THESIGER, L.J.: I am of the same opinion. I think that the order was conditional on the residence of the lunatic at a particular asylum, and came to an end when he was removed. We are then asked to take an equitable view, and make a retrospective order. I am of opinion that the court has no jurisdiction to do so, and that payment of what is due to the guardians can only be claimed from the administrator in a due course of administration.

Solicitors: Rogerson & Ford; Clarke & Calkin.

See note to In re Alison's Trusts, ante, p. 86.

[8 Chancery Division, 261.]

V.C.H., May 29, 1877. C.A., March 9, 11, 1878.

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\*WEATHERALL V. THORNBURGH.

[1875 W. 23a.]

Will—Construction—Accumulations—Thellusson Act (39 & 40 Geo. 3, c. 98)—Charge of Annuity and Legacies—Residue payable at a future Time—Acceleration of Interest—Intestacy.

A testator who died in 1852, gave freehold and leasehold estates to trustees upon trust for his wife for life or second marriage, and in case she should marry again, then from and after that event, during the remainder of her life, in trust to receive the rents and to hold the same during her life upon the trusts thereinafter mentioned, and after her death to the use of G. absolutely. He then gave his personal estate to the same trustees, and directed them to pay the income to his wife during her widowhood, but if she should marry again, then from and after such marriage all these bequests in her favor were to cease, and in lieu thereof they were to pay her, out of the rents and income, an annuity of £500, and, during her life, to invest the

surplus (if any); and after her decease such trust moneys, surplus, rents, funds, and accumulations of income were to be disposed of by the trustees in paying certain legacies; and the residue he gave to T. M. absolutely. The widow married again in 1854. Her annuity had been paid, as well as the debts and legacies, and since her marriage the residue of the rents and income had been invested and accumulated:

Held (affirming the decision of Hall, V.C.), that as to the surplus rents and income which would accrue between the expiration of twenty-one years from the testator's death and the death of his widow, there was an intestacy; and that T. M. was not entitled during the life of the widow to ask for payment of the accumulated funds, subject to provision being made for payment of the annuity and legacies.

THOMAS HURD, who died on the 16th of April, 1852, by his will, dated the 14th of that month, after giving a legacy and certain specific bequests to his wife, and bequeathing a leasehold messuage to two trustees, whom he appointed executors, upon trust for his wife during her life or widowhood, and after her decease or marriage to Thomas Messiter, absolutely, gave his freehold and leasehold hereditaments unto the same trustees, their heirs, executors, administrators, and assigns respectively, upon trust for his wife during her life or until her second marriage; and in case she should marry again (which event happened), then from and after her second marriage, during the remainder of her life, in trust to receive the rents and profits of his real and leasehold \*hereditaments, and to hold the same during the then residue of the life of his wife upon the trusts thereinafter mentioned; and from and immediately after the death of his wife, then as to all his last-mentioned real and leasehold estates to the use of George Messiter, his heirs, executors, administrators, and assigns, absolutely; and as to all other his personal estate, he gave the same to the same trustees upon trust for sale and conversion, with the consent of his wife, and out of the same to pay all his debts, funeral and testamentary expenses, and legacies; and as to all the residue of his personal estate, upon trust, with the consent of his wife, to invest the same and to pay the annual produce to his wife during her widowhood, but if she should marry again, then from and after such marriage he directed that all the bequests in her favor (except the pecuniary and specific bequests first above mentioned) should cease, and that in lieu thereof the trustees should, out of the rents and profits of the freehold and leasehold hereditaments, and out of the income of the residuary estate, pay his wife an annuity of £500 half yearly for her sole use; and he directed the trustees, during the life of his wife, to invest in their names the surplus (if any) which, after satisfying the annuity, should remain in their hands of the said rents and profits of the hereditaments, and the income of the stocks, funds, and

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securities of his residuary estate; and from and after her decease he directed that the said trust moneys, surplus rents (if any), stocks, funds, and securities, and the accumulations of interest thereon (if any), should be disposed of by the trustees in paying divers legacies to persons and charities, several of such legacies being contingent on the legatees surviving the testator's wife, and in holding a sum of £4,000 for such persons and upon such trusts as his wife should by will appoint; and with respect to the residue of the said trust moneys, surplus rents (if any), stocks, funds, and securities, after answering the purposes before mentioned, he gave and bequeathed the same to Thomas Messiter, his executors, administrators, and assigns, absolutely.

The testator's widow, in October, 1854, married the defend-

ant, Francis Thornburgh.

Thomas Messiter died in December, 1874.

The executors and trustees paid the testator's debts, 263] funeral and \*testamentary expenses, and such of the legacies as became payable immediately, and invested the residue of the personal estate. After the second marriage of the testator's widow the trustees paid her the annuity of £500 bequeathed to her out of the rents and profits of the real and leasehold estates, and out of the income of the residuary personal estate, and accumulated and invested the

surplus income.

The capital of the residuary personal estate consisted of the sum of £26,584 11s. 10d. Reduced Annuities standing in the names of the trustees; and the fund which had arisen from investment and accumulation of the surplus income of the real and residuary personal estates, consisting of £11,954 2s. 8d. Three per Cent. Consols, was also standing in their names; and they had a sum of £421 3s. 10d. cash. The legacies payable at the death of the testator's widow amounted to £24,520. Questions having arisen as to who were entitled to such parts of the accumulated fund as had arisen since the 16th of April, 1873, the expiration of twenty-one years from the death of the testator, and also to the future surplus rents and income of the estates which should accrue during the life of the widow, an action was commenced by the surviving trustee to have the trusts of the will carried into execution. The Chief Clerk made his certificate certifying that the testator was illegitimate, and that he never had any issue.

The action was tried before Vice-Chancellor Hall on the

29th of May, 1877.

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W. Pearson, Q.C., and Hamilton Humphreys, for the plaintiff.

Dickinson, Q.C., and Henderson, for the defendants, F. Thornburgh and his wife, the widow of the testator, claimed half the surplus income of the personal estate between the expiration of twenty-one years from the death of the testator and the death of the widow, during which period the accumulation was made void by the Thellusson Act (39 & 40 Geo. 3, c. 98).

`Rigby, for the Attorney-General, claimed on behalf of the Crown the surplus rents of the real estate and half the surplus income of the personal estate during the same

period.

Hemming, Q.C., and Chisholm Batten, for the personal \*representative of T. Messiter, contended that T. [264 Messiter, being absolutely entitled to the trust fund subject to the payment of the annuity and the legacies, was entitled to stop the accumulation as soon as a sufficient sum had been accumulated to provide for the annuity and the legacies, and to receive the surplus immediately. His representative was therefore entitled to the intermediate income, both of the real and personal property. They cited Saunders v. Vautier ('), Josselyn v. Josselyn ('), and Harbin v. Masterman (').

HALL, V.C.: In my opinion the views expressed by Vice-Chancellor Wickens in the case of Harbin v. Masterman do not apply to this case; at any rate, that case does not govern the present. The testator has not merely directed that an annuity shall be paid to his widow for life, but he has said that there shall be no division of the fund until after her death. He had a perfect right to do what his language shows he did, and he did that not merely for the purpose of postponing the enjoyment of the surplus by the residuary legatee, but for the purpose of making an accumulation to provide a fund for the payment of certain legacies which he bequeathed out of the accumulations. court having regard to the other trusts would not, irrespective of the Thellusson Act, set aside a fund in this case, and hand over the residue to the residuary legatee. But if the court would have done that, it would have been, not because of the will of the testator, but because it saw a mode of effectuating, without interfering with any rights, the object and purpose of the testator. To do that would be a departure from the declared intention; but the court would do that only when it could do it safely, and without inter-

<sup>(1) 4</sup> Beav., 115; Cr. & Ph., 240. (2) 9 Sim., 63. (3) Law Rep., 12 Eq., 559. 25 ENG. REP. 34

fering with any rights. This case, however, does not rest there, for the question has been considered by Vice-Chancellor Bacon in the case of Talbot v. Jevers ('), where there was a gift of realty and personalty to a trustee, a bequest of annuities, and a direction, subject to the payment of them 265] out of rents and income, to accumulate the \*surplus until the decease of the last surviving annuitant, "or during such portion of such surviving annuitant's life as the rules of law will permit," and on the decease of that person the trust funds and accumulations were to be applied by the court in the purchase of land for the benefit of the person mentioned in the will, and the Vice-Chancellor Bacon held that as to the fund which would accrue during the period which would elapse after the expiration of twenty-one years from the testator's death, and the death of the surviving annuitant, there was an intestacy; and he declined to give the fund, after providing for the annuities, to the person entitled in reversion during the life of the surviving annuitant. That case is undistinguishable from the present, and therefore I shall follow it.

The minutes were as follows:

Declare, that as between the persons entitled to the residuary real and personal estate, the annuity given by the will to the widow is payable ratably out of the income of the real and personal estate;

That the trusts for accumulation directed by the will, of the surplus income of the testator's residuary real and personal estate, ceased upon the 16th of April, 1873, being the expiration of twenty-one years from the testator's death; and,

That the surplus income of the testator's residuary real and personal estate from the 16th of April, 1873, down to the decease of the widow, are not effectually disposed of by his will, and that the defendant, the widow, is entitled to one equal moiety of such part of the surplus income so undisposed of, as has arisen or shall arise from personal estate; and that the Crown is entitled to the other moiety of such surplus of the personal estate, and the entirety of the surplus income as has arisen, or shall arise, from the rents, &c., of the real estate; and let the costs be paid out of the fund (£26,584) in court.

From this decision the personal representative of Thomas Messiter appealed. The appeal came on to be heard on the 9th of March, 1878.

Hemming, Q.C., and Chisholm Batten, for the appellant: The Thellusson Act has no effect on the fund in this case. There was an absolute gift to Thomas Messiter of everything that would not be required for the payment of the annuity and the legacies. Therefore, when sufficient had been accumulated to provide for these charges, which happened long before the twenty-one years limited by the act expired, Thomas Messiter had a right to come to the court and claim to have the surplus paid to him. The case is

(1) Law Rep., 20 Eq., 255; 13 Eng. R., 775.

\*governed by Saunders v. Vautier (') and Josselyn **[266**] v. Josselyn (1). If there had been no annuity or other charges payable out of the fund, there would have been no question as to the absolute right of the legatee of the fund to stop the accumulations: what difference can it make in his right that these are charges on the fund, if there is sufficient to pay them off?

[JAMES, L.J.: The fund may turn out, from unforeseen

circumstances, to be deficient.

The court will not regard so remote a contingency. fund were a million of money, and a legacy of £10 payable out of it at a fixed date, would the court allow the fund to go on accumulating till that date? Gosling v. Gosling (\*);

Coventry v. Coventry (1).

But if the court should be of opinion that the fund cannot be distributed till the death of the widow, although the accumulations must stop at the end of twenty-one years, we contend that the surplus income is given to the appellant by the Thellusson Act. The words of the act are, that "the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." Here, "the residue of the trust money, surplus rents (if any), stocks, funds, and securities, after answering the purposes aforesaid," are given at the death of the testator's wife to T. Messiter. With regard to the personal property, at all events, this passes the intermediate income to T. Messiter, though it may be different with respect to the intermediate rents of the real estate: Hodgson v. Earl Bective (\*); In re Clulow's Trust (\*); Ellis v. Maxwell (').

Rigby, for the Attorney-General: When the court stops the accumulations at the request of the person entitled to the fund, it is not done as a matter of right, but \*of [267] indulgence to the claimant, because by the accumulation he is injured and no one is benefited. But if the rights of any one else may by possibility be affected, the court will not interfere. It has never been done where there is a charge on the fund, though it might perhaps be done if the charge were of such a nature that it could be paid off at once; but here that cannot be done, for the legacies are not to be paid

<sup>(1) 4</sup> Beav., 115; Cr. & Ph., 240. (2) 9 Sim., 63.

<sup>(2)</sup> Joh., 265. (4) 2 Dr. & Sm., 470.

<sup>(5) 1</sup> H. & M., 376; 10 H. L. C., 656.

<sup>(6) 1</sup> J. & H., 639.

<sup>(1) 3</sup> Beav., 587; 12 Beav., 104.

till the death of the widow. There is nothing, therefore, to prevent the Thellusson Act from taking effect in this case, and if it does, the intermediate income both of real and personal estate must go as in an intestacy. There is no gift of it to T. Messiter. It is a lapsed portion of a residue, and therefore cannot go to the residuary legatee: Harbin v. Masterman ('); Eyre v. Marsden ('); Oddie v. Brown (');

Jarman on Wills (').

Dickinson, Q.C., and Henderson, for the widow of the We claim half the intermediate income of the present estate on the same grounds as the Attorney-General What the testator was dealing with claims the other half. was residue, and he was providing for its distribution at the death of his widow. He directed that it should not be divided till that time; indeed, it is impossible that it should be, for some of the legacies are contingent, and the legatees cannot be determined till that event happens. Therefore the gift of the surplus was a gift entitling the donee to call for payment of it during the widow's life. Suppose the gift had been to accumulate the income till the death of his widow, and then to pay £1,000 to each of the grandchildren of A. then living, and the surplus to B., how could B. claim the fund, whatever the amount might be, before the event happened? In the present case, although the amount payable is not contingent, the persons to receive it are: Green v. Gascoyne (\*); Wildes v. Davies (\*); Theobald on Wills (\*).

The Thellusson Act has never been allowed to accelerate the interest of the persons entitled to the fund subject to the

accumulations.

[8] \*Hamilton Humphreys, for the plaintiff. Hemming, in reply: The Thellusson Act by its very terms was intended to prevent accumulations where but for that act they would have extended beyond twenty-one years, and not to alter the rights where without that act the accumulations would have been stopped by the ordinary action This was the view of Vice-Chancellor Wickof the court. ens in *Harbin* v. *Masterman* (\*), and it is founded on sound principles of construction of statutes. No doubt Talbot v. Jevers (') would be against us, if there had been a residuary gift in that case. But the Vice-Chancellor held there was not; and if he had not so read the will, his decision would have been, as we submit, erroneous in principle.

(1) Law Rep., 12 Eq., 559.

<sup>&</sup>lt;sup>2</sup>) 2 Keen, 564. (\*) 4 De G. & J., 179.

<sup>(4) 3</sup>d ed., vol. i, p. 292. (5) 4 D. J. & S., 565.

<sup>(6) 1</sup> Sm. & Giff., 475. (7) Page 308.

<sup>8)</sup> Law Rep., 12 Eq., 559.

<sup>9)</sup> Law Rep., 20 Eq., 255; 13 Eng. R., 775.

JAMES, L.J.: I am of opinion that the decision of the Vice-Chancellor must be affirmed. The will must be considered independently of the Thellusson Act, and then the Thellusson Act must be applied to the state of things so determined. The Thellusson Act says that "where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." The first question, therefore, is: If, independently of the Thellusson Act, the accumulations had only lasted for twenty-one years, to whom would the income after the expiration of twenty one years have gone? This must be decided in the same way as if the testator had said in a codicil, "Since the making of my will I have been reminded that my wife may live more than twenty-one years after my death. therefore direct that the accumulation which I have divided by my will shall stop at the end of twenty-one years." What would have been the result of such a direction? The effect would have been that after \*twenty-one years there would have been a gap. He directs that the capital and the accumulations shall not be divided till the death of his wife, so that if he made no distribution of the surplus income of the twenty-one years, and his wife was still alive, there would have been a gap as to the intermediate income till the death of his wife. Who, then, would be entitled to that income? I am of opinion that Thomas Messiter is not the residuary legatee under the will; he is only residuary cestui que trust in remainder after the death of the wife of the particular fund, and there is nothing in the Thellusson Act to give the accumulations to him. There is no gift of the surplus income to any person whatever until the death The testator has divided the enjoyment of his of the wife. property into two parts, something to be enjoyed before and something to be enjoyed after the death of his wife. Accumulations which fail under the Thellusson Act must be treated in the same way as a gift which fails under the Mortmain Act. It has never been held that property that is set free by the operation of the Mortmain Act will accrue. for the benefit of the persons entitled in remainder. the same as if the testator had only directed accumulation for twenty-one years, and had said nothing as to the income after that time till the death of his wife.

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In Saunders v. Vautier (') the bequest was quite different. There was an absolute gift to begin with, and then a direction to accumulate the income, and the legatee attained twenty-five, and the court acted on the established principle that where there is an absolute gift to an adult male, any direction to restrain his enjoyment of it is absolutely idle, unless there is a defeasance. In such a case a direction to accumulate the income is only a mode of preventing the person entitled from enjoying the property, which can have no effect.

It was said that this case is within the principle of Hodgson v. Earl Bective ('), which decided that where there is a gift of personal property to a man at a future time, it carries the intermediate income. But that is because in such a case there is a clear indication of the testator's wish that the legatee should have the income; it goes, by way of ac-270] cretion, to the person absolutely \*entitled to the capital. That does not apply to a case where the testator has said what is to be done with the income till the particular period arrives. The order of the Vice-Chancellor must be affirmed.

COTTON, L.J.: The first question is this: As soon as a sufficient sum has been accumulated to meet the charges on the fund, has the person ultimately entitled to the residue of the fund a right to come to the court and claim to have the residue of the fund paid at once to him? This is not like the case of Saunders v. Vaulier ('). That case simply decided that if property is given to a person of full age, any restriction on his enjoyment of it is inconsistent with his absolute interest. But here it is conceded that until the accumulated fund had become sufficient to pay the legacies the direction to accumulate was for an object which was legal, and which ought to have effect given to it. Then it happens in this case that the legacies cannot be paid till the death of the widow; therefore it is not like dealing with a case where there are no legacies charged on the fund. That being so, can the appellant say that he is entitled to the residue of the fund as soon as there is sufficient to pay the legacies? He cannot be entitled of right, because if from any accident to the investment it should become insufficient, the legatees would have a claim upon him. Perhaps the court, having due regard to the security of the legacies, would, if it thought there was no reasonable probability of any loss occurring, pay out the residue to the person entitled. But it is a matter of indulgence and discretion in the court.

<sup>(1) 4</sup> Beav. 115; Cr. & Ph., 240.

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trustee could not without risk pay over the fund: if he did, he would be liable in case the fund proved insufficient. It would be otherwise if it was a matter of right. All that can be said is, that it is in the discretion of the court whether, under peculiar circumstances, it shall keep the person entitled to the residue of the fund any longer out of the enjoyment of his property; but of right he cannot claim it.

Therefore I am of opinion that in this case the appellant could \*not have come when the fund was sufficient [271 for payment of the legacies and stop the accumulations by

claiming the residue of the fund.

Then comes the question of the effect of the Thellusson Is the appellant "the person who would have been entitled to the surplus income if the accumulation had not been directed?" It is argued that he is the residuary legatee under the will and therefore that he would have been entitled to the income if the accumulation had not been directed, and Ellis v. Maxwell (1) was referred to. But that case was very different from the present. There the testator made his wife by a separate clause his residuary legatee of Of course anything which he might not have disposed of. that would carry the property comprised in every gift which failed for illegality. Here the appellant is not appointed residuary legatee by an independent clause, he is only a legatee in remainder of the accumulated fund, and there is a gap between the expiration of the period of twenty-one years and the time when he will become entitled to it. The testator gave him the accumulated fund as the legatee of that fund and not as residuary legatee. During the lifetime of the widow he could claim nothing; he was only legatee in remainder after the death of the widow of a fund already constituted.

THESIGER, L.J.: I also agree that the decision of the Vice-Chancellor must be affirmed. The principle on which the court construes a bequest of accumulations which has become void under the Thellusson Act is laid down in Eyre v. Marsden. The Master of the Rolls there says (\*): "The statute, as it appears to me, was not intended to operate, and does not operate, to alter any disposition made by the testator, except his direction to accumulate. Striking that out, everything else is left as before, and all the other directions of the will as to the time of payment, substitution, or any contingencies, are to take effect according to the true construction of the will, unaltered by the effect of the statute." Following out this principle, it was held in Green v. Gas-

<sup>(1) 3</sup> Beav., 587; 12 Beav., 104.

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coyne('), that the effect of the \*statute is not to accelerate the enjoyment of any interest under the will. fore the only question is whether the appellant has such an absolute interest as would entitle him to stop the accumulation as in Saunders v. Vautier (\*). If this be the true question, the decision in Talbot v. Jevers (\*) is in point. In that case the testator by the words of his will created a gap between the period when the accumulation was to cease and the death of the surviving annuitant, and the court held that there was an intestacy with respect to the intermediate income, and refused to stop the accumulations and to pay the fund, subject to provision for the annuities, to the person ultimately entitled to the fund. In the present case the gap is caused by the statute, and it appears to me that the statute places it on the same footing as if it had been directed by the will. It was not denied that, but for the distinction to which I have referred, Talbot v. Jevers and the present case are undistinguishable. I will only add that the will does not constitute the appellant residuary legatee, but a legatee of a particular fund after the death of the widow, and therefore his interest is one which does not take effect until after her death.

With respect to the surplus rents of the real estate the appellant's claim for them has been abandoned.

Solicitors: W. J. Moon; Hare & Fell; J. Watson, agent for J. R. Bramble, Bristol; Wedlake & Letts, agents for H. B. Batten, Yeovil.

(1) 4 D. J. & S., 565. (2) 4 Beav., 115; Cr. & Ph., 240. (8) Law Rep., 20 Eq., 255; 13 Eng. R.,

[8 Chancery Division, 273.]

V.C.H., July 20; Aug. 1, 1877. C.A., March 11, 12, 1878.

273] \*In re Pinto Silver Mining Company.

Company — Voluntary Winding-up — Dissolution — Companies Act, 1862, s. 143— Acquiescence.

The P. Company granted a mortgage of all its mining property to two trustees upon trust to secure, pari passu, the sums advanced by various lenders, of whom K. was one. Some time afterwards, it being thought desirable to reconstitute the company, resolutions were passed for a voluntary winding-up, and the liquidators agreed for the sale of the assets to the B. Company, which was formed for the purpose. The price was to be paid partly in bonds and partly in shares of the B. Company. A meeting of the mortgage creditors was held, at which the sale was unanimously approved of. K. was not present at this meeting, but there was evidence that he knew of and acquiesced in all that was done under the winding-up. The sale was completed and the property conveyed to the B. Company by a deed in which the mortgagees and their trustees did not join. Most of the mortgagees accepted debentures of the B. Company in satisfaction of their claims; but K. did not. The

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liquidators made their financial report, and called a meeting to consider it, pursuant to sects. 142, 143 of the Companies Act, 1862, and the return was registered.

three years after this K. presented a petition to wind up the P. Company:

Held. by Hall, V.C., that the company could not be deemed to have been dissolved as against the petitioner and other unsatisfied creditors; and that an order for wind-

ing it up ought to be made:

Held, on appeal, that as the petitioner had all along known of and acquiesced in

the winding up proceedings, he could not now treat the dissolution as invalid:

And, \*\*emble\*, that there is no jurisdiction to wind up a company which has been dissolved under the Companies Act, 1862, s. 148, unless the dissolution can be impeached on the ground of fraud.

This was a petition by Thomas Key, a creditor, for the compulsory winding up of the Pinto Silver Mining Com-

pany, Limited.

The company was incorporated in 1871, with a capital of £130,000, in 26,000 shares of £5 each. Its objects were stated in the memorandum of association as being (inter alia) to purchase certain lands or interests in lands in Nevada or

elsewhere for the purpose of mining operations.

\*By the 66th clause of the articles of association it was provided that the directors should be at liberty to raise by loans upon mortgage of the lands, property, and works and effects of the company, or by promissory notes, bills of exchange, and other transferable securities, and otherwise, as they should think fit, such sums of money as they should from time to time require for carrying on or extending the

works, or for any objects of the company.

In 1872 the company determined to raise a sum of money by mortgage bonds, the repayment of which was to be secured by a general mortgage of the company's property For this purpose two deeds of the 16th of July, 1872, were executed, by the first of which the company conveyed its mines and mining rights, property, and assets in Nevada unto and to the use of Gosset and Cresswell, their heirs, executors, administrators, and assigns, upon trust to sell and to hold the proceeds upon the trusts declared by the other deed of the same date. By the second deed made between the same parties it was declared that the trust for sale should not be exercised unless the trustees or trustee should be authorized in writing to sell by not less than five of the persons who should advance money on the bonds, and who should be entitled in the aggregate to not less than one-half of the whole sum advanced to the company. it was declared that the trustees should hold the property until sold, and after sale, the proceeds of such sale, upon trust to secure the repayment to the persons advancing money on the mortgage bonds in proportion to the moneys advanced by them, without any preference or priority, the

25 Eng. Rep.

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whole of the principal moneys advanced by them with simple interest at £20 per cent. per annum from the periods of the respective advances, the interest, in the case of deficiency, being the first charge.

The petitioner Key advanced to the company £1,000, in respect of which he was entitled to the benefit of the trust created by the above deeds; and various other persons made advances on similar security. It did not appear that

any mortgage bonds were in fact issued to them.

On the 22d of January, 1873, the following resolutions were passed at a meeting of shareholders: 1. That the com-275] pany \*should be wound up by voluntary liquidation. 2. That S. H. Louttit and M. Dyett should be appointed liquidators. 3. That the liquidators should be authorized and instructed to sell for shares the company's mill, furnaces, mines, and premises, subject to the existing mortgage debt and other liabilities of the company. These resolutions were confirmed at a meeting held on the 12th of February, 1873.

The liquidators came to an arrangement to sell the property of the company to the Basye Consolidated Silver Mining Company, a company which was formed for the purpose. and in which the shareholders were, with hardly any exceptions, the same persons as those of the Pinto Company. The terms were embodied in an agreement dated the 26th of March, 1873, made between the liquidators of the one part, and the Basye Company of the other part, and duly registered as required by 30 & 31 Vict. c. 131, s. 25. By this agreement the liquidators agreed to sell, and the Basye Company to purchase, all the property of the Pinto Company in Nevada for £91,000, of which £9,000 was to be paid in debenture bonds of the Basye Company, £19,000 in fully paid up £5 shares in that company, and £63,000 in £5 shares in that company, on which £4 10s. per share was to be taken as paid, leaving a liability of 10s, on each share. Clause 7 of the agreement provided: "That in case any of the shareholders, mortgagees, or creditors of the said Pinto Silver Mining Company, Limited, shall neglect or refuse to accept his or their allotment in debenture bonds, or fully paid-up shares, or shares with a liability of 10s. thereon in the said purchasers' company, the said liquidators shall transfer their interest in such proportion or allotment of debenture bonds or shares back again to the said purchasers' company, without incurring any liability or responsibility in respect to any such debenture bonds or shares." Clause 8. "The said vendors shall make a perfect and complete title

to the said mines and premises." Clause 9. "That immediately the agent of the said purchasers shall certify that the title is good by telegraphic message, or otherwise the said purchasers shall complete the purchase and deliver over the said debenture bonds and certificates of fully paid shares and shares with £4 10s. paid to the said vendors, and the said vendors \*shall thereupon put the purchasers in possession of the said mines, mining properties, mills, and prem-Clause 14. "That inasmuch as the said vendors are liquidators of the said Pinto Silver Mining Company, Limited, and it is the true intent and meaning of them and the said purchasers that the said purchasers should take over all the property and discharge all the debts and liabilities of the said Pinto Silver Mining Company, Limited, and that the said purchase-money in debentures and shares should include and be sufficient to discharge all such debts and liabilities, and pay them either in debentures or shares as aforesaid, it is hereby expressly further agreed and declared that the said purchasers shall pay and discharge any further debts or liabilities of the said Pinto Mining Company, Limited, should any be discovered after the day of the signing of this agreement, and generally any debts and liabilities which are not provided for by the agreement, and indemnify the said vendors therefrom."

A meeting of the mortgagees was called to consider the above arrangement, and was held on the 14th of July, 1873. It was attended by more than three-fourths in number and value of the mortgagees, and a unanimous resolution was passed approving of the agreement. Key, it appeared, was not present. Cresswell, one of the trustees for the mortgagees, who was also chairman of the company, deposed that substantially the mortgagees were the only creditors of the company. The sale was completed by a conveyance from the Pinto Company to the Basye Company, not mentioning the mortgage which remained vested in Gossett and Cresswell, and of which the Basye Company had full notice.

The liquidators stated the result of the winding-up in the following report, dated the 6th of January, 1874:—

"In accordance with the following resolutions passed at the meeting of shareholders held on the 22d day of January, 1873, and confirmed by a subsequent meeting on the 12th day of February, 1873,—

1. That the Pinto Silver Mining Company, Limited, be would up by voluntary liquidation;

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2. That Messrs. Samuel Henry Louttit and Mark Dyett be appointed liquidators thereof;

\*3. That the liquidators be authorized and instructed 2771 to sell for shares the company's mill, furnaces, mines, and premises, subject to the existing mortgage debt and other liabilities of the company,

we proceeded to dispose of the property of the company to the Basye Consolidated Silver Mining Company, Limited. A copy of the agreement made by us with this object is set forth in the articles of association of the Basye Consolidated Silver Mining Company, Limited, now laid before the

meeting.

"We also offered to the shareholders of the Pinto Silver Mining Company, Limited, another opportunity of de-claring their option to take fully paid shares in the Basye Company equal to one in ten of their holding in the Pinto Company, or to accept shares with £4 10s. paid and a further liability of 10s. per share for the same amount as they held in the Pinto Company in exchange as their portion of the purchase-money.
"With very few exceptions all have elected to take one

option or the other.

"The account now submitted is the final account of the liquidation, and shows the disposal of the shares and debentures received from the purchasers of the property.

"The balance of the shares standing in our names in the Pinto Company have been handed by us to the Basye Consolidated Silver Mining Company, Limited, in accordance with the conditions of the agreement entered into with them.

"A small cash balance of £9 has also been handed over to

the Basye Company.

"In giving you the final report of our labors we take the opportunity of congratulating you on the improved position you now hold as shareholders in the Basye Company, which we understand from the directors promises to realize all the hopes once formed of the Pinto Company."

Key did not declare any option, and never received either shares or debentures in the Basye Company.

The final account rendered by the liquidators and sent with the above report was as follows:—

	VIII.]	III.] CHANCERY DIVISION.					
C.A.		In re Pinto Silver Mining Company.					
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	By Apportionment of debenture bonds of the Basye Consolidated Silver Mining Comnant United as new screenest	26th March, 1873, for the mortgagess of the Pinto Mill, and sundry other creditors, itors, "Apportionment to shareholders of fully paid up shares of the Basye Consoli-	dated Silver Mining Company, Limited, under the option No. 2, namely, 1 in 16, "Apportionment to shareholders of shares in the Basye Consolidated Silver Mining Company Limited 10 081 on which	24 10s. per share has been paid, and leaving a liability of 10s. per share under the option No. 1, namely, share for share, Return to the Base Consolidated Silver	shares, on which £4.10s, per share has been paid, being balance of shares not accepted by shareholders in the Pinto Commany and returned to the Barye	Company in accordance with the terms of the contract, "Printing, stationery, and petty expenses, "Balance, handed to Baye Consolidated Silver Mining Company, Limited,	
	18 8. d.				91,000 0 0		£91,018 4 10
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	43			9,000	63,000		
Dr.	To cash received from Secretary, being balance in hand as per cash book	"proceeds of sale of the company's mines, crushing mill, &c., as per agreement, dated March 26th, 1873, with the Basye Consolidated Silver	Mining Company, Limited, authorized at the last meeting of shareholders, as follows:		14,000 shares,		

279] \*A meeting was called for the 6th of January, 1874, for the purpose of having the final account of the liquidators laid before it, and was convened and advertised in manner required by the Companies Act, 1862, s. 142. A return of this meeting was duly made on the 12th of January, 1874, as required by sect. 143, and was registered.

In December, 1876, Key presented a petition for winding up the Pinto Company. This petition, after shortly stating the petitioner's title as a creditor in respect of the £1,000 and the resolutions for voluntary winding up, proceeded as

follows:—

"10. Nothing has been done under the voluntary winding up to or towards liquidation of its affairs or payment of its creditors. 11. Your petitioner believes that if the assets of the company were realized, there would be sufficient funds applicable to the payment of his claim to satisfy it, or nearly so. 12. Under present circumstances the company cannot pay its debts. 13. The company has not done any business for a year prior to the presentation of this petition. 14. It is just and equitable that the company should be wound up by this honorable court." The petitioner prayed a compulsory winding-up.

Evidence was given on the part of the liquidators, Louttit and Dyett, that Key, though he did not attend the meeting of mortagees, was fully aware of the proceedings under the

winding up, and assented to them.

The petition came on for hearing before Vice-Chancellor

Hall on the 20th of July, 1877.

Karslake, Q.C., and Latham, for the petitioner, referred to the Companies Act, 1862, ss. 142, 143, 145, 146, and In re Crookhaven Mining Company ('). They urged that the affairs of the company were not fully wound up, as its debts had not been paid.

Dickinson, Q.C., and Beale, for the liquidators of the

Basye Company, supported the petition.

W. Pearson, Q.C., and Pugh, for Louttit and Dyett, opposed: The affairs of the company were fully wound up, 280] and under \*sect. 143 the company no longer exists: Carr's Case(\*). The petition ought to be dismissed: In re Haytor Granite Company (\*).

Ingle Joyce, for shareholders.

Karslake, in reply.

Aug. 1. Hall, V.C., after stating the facts, continued: The petition to wind up is opposed, it being contended

(1) Law Rep., 3 Eq., 69. (3) 33 Beav., 542. (3) Law Rep., 1 Ch., 77, 80.

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that the petitioner, if ever a creditor, became a creditor of the Basye Company, there being a novation. It appears to me that this is not made out. The petitioner had not personally been in direct communication with the Basye Company, and never had issued to him the bonds in that

company.

It was said that although the petitioner was not present at the meeting of the mortgagees, he was made acquainted with what had taken place, and after the meeting approved of what had been done thereat; but, assuming this to be so, each of the mortgage creditors was, under the agreement with the Basye Company, to have the option of taking the debenture bonds of that company, and under the circumstances of this case I consider that the petitioner, within the meaning of the 7th clause of the agreement with the Basye Company, neglected to accept his proportion of the debenture bonds, and therefore remained a creditor of the Pinto

Company.

I have assumed that the resolutions authorizing the sale to the Basye Company were valid as against the petitioner by reason of the meeting of the mortgagees, which, however, I do not state to be the case, the meeting being a meeting of mortgagees only, and not of creditors of the company generally, as required by the Companies Act, 1862, s. 162. Moreover, the agreement for sale to the Basye Company did not conform to the resolutions of the 22d of January, and the 12th of February, 1873, inasmuch as it did not provide for the sale being subject to the existing mortgage debt and the other liabilities of the company, and the conveyance was framed as an ordinary conveyance, free from incumbrances. This was a clear breach of trust on the part of the trustees for the \*mortgage creditors. The petitioner in his [28] last affidavit states that he was not aware of this departure from the resolutions till shortly previous to the filing of his petition. Under such circumstances, the petitioner retained his rights as a creditor of the Pinto Company.

It was further contended that the petition was not sustainable by reason of the Pinto Company having been, as it was said, dissolved. The dissolution, it was said, was effected thus: The liquidators of the Pinto Company, on the 6th of January, 1874, reported to the shareholders the sale which had been made to the Basye Company, and with that report was an account which the report stated to be the final account of the liquidation, and which showed the disposal of the shares and debentures received from the purchasers of the property. It further stated in effect that, with few ex-

ceptions, the shareholders had taken shares in the Basve Company, and it then stated as follows: "The account now submitted is the final account of the liquidation, and shows the disposal of the shares and debentures received from the purchasers of the property. The balances of the shares standing in our names in the Pinto Company have been handed by us to the Basye Consolidated Silver Mining Company, Limited, in accordance with the conditions of the agree-A small cash balance of £9 ment entered into with them. has also been handed over to the Basye Company. In giving you the final report of our labors, we take the opportunity of congratulating you on the improved position you now hold as shareholders in the Basye Company, which, we understand from the directors, promises to realize all the hopes once formed of the Pinto Company." It will be observed that this report does not deal with the mortgagees of the Pinto Company. In the account which accompanied the report, the debtors' side contains in debenture bonds bearing 15 per cent. interest, £9,000, and the creditors' side contains—"By a portion of the debenture bonds of the Basye Consolidated Silver Mining Company, as per agreement, dated 26 March, 1873, for the mortgagees of the Pinto Mill and sundry other creditors, £9,000." Such of the mortgagees in the Pinto Company as did not accept the debenture bonds of the Basye Company, amongst whom was the petitioner, are thus not deal with, except that apparently from 282] the account, although this \*is not made clear, the liquidators have thought fit to treat the bonds of the Basye Company as substantially the bonds of the Pinto Company, though the liquidators cannot prove, at least against the petitioner, any express or other authority so to do, and I am of opinion that the report and accounts in no way affected the mortgage creditors in the Pinto Company who had not bonds in the Basye Company sent to them.

The report and account having been then sent to the Pinto Company, the liquidators' next step was to make to the Registrar a return of the meeting. This was made on the 12th of January, 1874, and it is contended that, this having been done, the Pinto Company, on the 12th of April following, became dissolved by virtue of the Companies Act, 1862,

88. 142, 143.

It appears to me that this company cannot be deemed dissolved, at least as regards the petitioner and the other unsatisfied creditors of the company. The 142d section is only capable of being acted upon as soon as the affairs of the company are fully wound up. Such was not the case when the

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meeting in question was held and the return made. The case of *In re Crookhaven Mining Company* (') supports the view which I take. There must be the usual order for winding up.

The liquidators appealed. The appeal was heard on the

11th and 12th of March, 1878.

W. Pearson, Q.C., and Pugh, for the appellants: We contend that, after a dissolution under sect. 143, there is no jurisdiction to order a company to be wound up. Creditors have ample means of knowing what is going on, for the winding-up of a company is attended with great publicity, and there is no ground of expediency for cutting down the natural meaning of sect. 143 in order to help creditors who have not thought fit to intervene till the three months have expired. But apart from this general ground, it is clear in the present case the petitioner knew and assented to everything that was done, and after having assented to the transfer of the whole property of the company to another company which undertakes to pay the mortgage debts, he cannot retain his claim against the original company.

\*Ingle Joyce, for shareholders, supported the appeal. [283 Latham, contrà: As to dissolution, the 142d section contains words which override all the sections relating to dissolution; it requires that all the affairs of the company shall have been wound up, and if they have not been fully wound up there is no dissolution: In re Crookhaven Mining Com-

pany(').

[JAMES, L.J.: Can it have been the intention of the Legislature that where the form of proceeding prescribed has been duly complied with the court shall go behind the return? No wrong is done to creditors by the opposite view. They

have ample time to interfere.

No notice is given creditors. There is only an advertisement in the *Gazette*, which may well escape their notice. Then as to the other point, it is submitted that a mortgagee does not cease to be a creditor of the mortgagor because he assents to the mortgagor conveying the equity of redemption to some one else.

JAMES, L.J.: This case must have been decided under some misapprehension as to the facts. The first point raised is whether the court has any jurisdiction to make a winding-up order after a dissolution of the company under a voluntary winding-up, and I much doubt whether there is any such jurisdiction. Where there has been a de facto winding-up;

(1) Law Rep., 3 Eq., 69.

liquidators appointed; the accounts of the liquidators laid before a meeting, as required by the Companies Act, 1862, s. 142; a return duly made to the Registrar, and the statutory period of three months elapsed, it would need a great deal of argument to satisfy me that the court can go behind the return. The provisions of the act as to dissolution would be of very little value if a creditor could, after that period, come and open the whole matter because, through mistake, some formality had been omitted, some creditor had not come in, or some asset had been left undiscovered. The only case in which it is desirable that what has been done should be undone is where there has \*been a fraud by which some one is injured. Such a fraud must be the fraud of somebody, and the person guilty of it would be personally liable; but it may be that it would also invalidate the proceedings. Such a case, however, must be established in a petition impeaching the proceedings on the ground of fraud, not on a petition alleging that nothing was done under the winding-up.

But in the present case I am of opinion that the petitioner is estopped from disputing the validity of the dissolution. We need not decide that there was any novation, though there appears good reason to contend that there was a novation through the petitioner's agent. But when a person having knowledge of what is being done assents by his trustees to the transfer of the property of the company to another company, being aware that the former company was in course of winding up, and takes no step during the whole of that winding-up, it is utterly out of the question that he should be at liberty to come after the lapse of years and upset all that has been done. The petition must be dismissed with costs, and the appellant must have his costs of

the appeal.

Corton, L.J.: The first question is whether the court had any jurisdiction to make a winding-up order. I am of opinion that if the conditions of sects. 142 and 143 of the act have been complied with, the court has no jurisdiction to make such an order after the expiration of the three months; for the company has ceased to exist, having been wound up in a way which, if the provisions of the act have been complied with, is as effectual as a winding-up by the court. It is true that sect. 145 provides that the voluntary winding-up of a company shall not be a bar to the right of any creditor to have it wound up by the court. But this, in my opinion, only means that a voluntary winding-up shall not be any bar to a creditor who applies for a compul-

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sory winding-up before the company has been dissolved. If he applies before the expiration of the three months there is a company to be wound up, but after that period there is no company. The case before the Master of the Rolls is no authority for the proposition that after the three months the court has jurisdiction to order a compulsory winding-up;

and I am of opinion that it has not.

\*It is urged that the company has not been com- [285] pletely wound up, and that therefore sect. 143 does not apply. It is not necessary to give any opinion as to what is to be done where there has been a substantial non-compliance with the provisions of the act, but the mere fact that there are debts remaining unpaid is no such non-compliance, otherwise an insolvent company could never be dissolved; and as to the other matters alleged, I do not think they would justify opening the winding up if the court had jurisdiction to do so. Moreover, the petitioner has substantially been aware of all that has been done; he knew that the property was to be transferred to the other company, and that a final meeting was called to consider the liquidators' account. After having thus lain by, he cannot now come to have the proceedings ripped up.

THESIGER, L.J.: If it were necessary to decide the point,

I should be disposed to hold that the court has no jurisdiction to make a winding-up order after the expiration of three months from the close of a de facto voluntary winding-up. The act contains provisions affording all reasonable protection to creditors. Sect. 132 provides for the advertisement of the resolution for winding up, so that all persons whose interests are affected may have notice of what is going on. Then, under sect. 142, the final meeting is advertised for at least a month, and by sect. 143 the company is to be deemed dissolved at the expiration of three months from the date of the registration of the return made by the liquidators. Reading sects. 145 and 146 in connection with these provisions, I think it clear that proceedings by a creditor to have the company compulsorily wound up, or to have the winding-up continued under supervision, must be taken before the three months have expired. I do not, however, think that it is necessary on the present occasion to decide that question, for, without going so far as to say that there has been in this case an absolute novation, I am of opinion that there has been such a complete assent by the creditor to the voluntary winding-up as to preclude him from at-

tempting to impeach it. Gosset, by his affidavit, says: "During the time that the liquidators of the above-named

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company were conducting the liquidation of the said company I frequently saw the petitioner, Mr. Thomas Key, and \*had conversations with him respecting the windingup of the company and the formation of the said Basye Consolidated Mining Company, Limited. As the result of such conversation, I am able to state positively that the said Mr. Key was perfectly aware of all that took place with reference to the transference of the property of the abovenamed company to the said Basye Company, and also that it was the intention of the liquidators of the above-named company to close the liquidation of the said company, and that the said Basye Company was to be substituted for the above-named company as the debtors for the moneys advanced by the mortgagees." This is confirmed by the affidavits of Cresswell and Creamer. The affidavits, it is true, are in somewhat general language, but the case is one where, if it was intended to dispute the facts to which these witnesses depose, they ought to have been cross-examined. come clearly to the conclusion that Mr. Key assented to the winding-up, and it is out of the question that he should be allowed to come after a lapse of four years to impeach proceedings to which he assented at the time.

Solicitors for liquidators: Peckham, Maitland & Peckham. Solicitor for petitioner: J. Wilson Heritage. Solicitors for shareholders: Wansey & Bowen.

## [8 Chancery Division, 286,]

V.C.H., June 18, 19, 20, 23, 25, 26, 27, 1877. C.A., Dec. 10, 11, 1877; Jan. 14, 15, 18; March 12, 1878.

DE BUSSCHE V. ALT.

[1878 D. 53.]

Principal and Agent—Sub-Agent—Agent making a Profit by Sale to Himself— Acquisecence.

The plaintiff, in the year 1868, consigned a ship to G. & Co. in China for sale, fixing a minimum price of \$90,000, and requiring cash payment. G. & Co. employed the defendant in Japan to sell the ship, with the same instructions. This was done with the knowledge and consent of the plaintiff. The defendant, having vainly attempted to sell the ship on the terms mentioned, took her himself for \$90,000, and about the same time resold her to a Japanese prince for \$160,000, payable as to \$75,000 in cash, and the rest on credit. The plaintiff was not informed that the defendant had purchased the vessel himself, or that he had resold it, till June, 1869, after the transaction was completed. The defendant paid \$90,000 to G. & Co., 287] \*who remitted it to the plaintiff, and eventually obtained the whole amount of \$160,000 from the Japanese prince. In 1873 the plaintiff filed a bill in chancery to compel the defendant to account for the profit made by him in the resale of the ship:

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Held (affirming the decision of Hall, V.C.), first, that the relation of agent and principal was established between the defendant and the plaintiff, and existed at the time of the purchase and resale of the ship by the defendant, and that he was therefore liable to account to the plaintiff for the profit made by him in the transaction: Secondly: That there had been no such acquiescence or laches on the part of the

plaintiff as to disentitle him to relief.

Where a wrongful act has been completed without the knowledge or assent of the party injured, his right of action is not ordinarily barred by mere submission to the injury, or even by a voluntary promise not to seek redress; some conduct amounting to release or accord and satisfaction must be shown; although, on account of laches, relief may be refused under special circumstances.

THE bill in this case was filed by Edward Münster De Bussche, a merchant or shipowner in the Isle of Wight, against William John Alt, who was a member of the firm of Alt & Co., merchants in Japan, and sought to make the defendant liable to account, as the plaintiff's agent, for profits made by him in the purchase and sale of a steamship called the Columbine. The facts which led to the institution of the suit were as follows: In the year 1868 the plaintiff was the registered owner of two composite screw-steamers called respectively the Columbine and the Nymph, subject to a mortgage to Messrs. John Willis & Son, merchants in London, to secure an account current. Each of the steamers was intended by the plaintiff, according to his usual course of business, for sale in some port in India, China, or Japan; and in the summer of 1868, by arrangement between the plaintiff and his mortgagees, who were pressing for payment of the mortgage debt, the vessels were consigned for sale to Messrs. Gilman & Co., a firm of merchants carrying on business at Hong Kong and Shanghai, in China, and at Yokohama, in Japan. The amount of the mortgage debt was very much below the selling value of the vessels, and although Willis & Son took the active part in the original consignment, Gilman & Co. subsequently corresponded with the plaintiff rather than with Willis & Son, and acted as his agents in the transaction.

The consignment was announced by Willis & Son to Gilman & \*Co. on the 3d of July, 1868, in a letter which [288] "The Columbine is now contained the following passage: at Bombay, and if she cannot be sold will take cotton round to China, where, if a sale does not take place, we must beg of you to send her with a freight to Shanghai, Nagasaki, or Yokohama, or all three ports if necessary, so as to get her sold as soon as possible. We understand that you have no establishment at Nagasaki, but no doubt you can appoint some good agents to do the business; but we have to caution you that great care should be taken in appointing an agent

where a sale is likely to be effected, as Mr. De Bussche will naturally look to us for the proceeds."

The firm of Alt & Co., of which the defendant was at that time a partner, had three different branches in Japan, one at Nagasaki, another as Osaca, and a third at Hiogo, and had been from time to time employed by the plaintiff as agents for the sale of merchandise. The defendant was the managing partner at Osaca and Hiogo, and a Mr. Hunt was the manager of the Nagasaki branch. The defendant, learning that the two steamers had been consigned for sale, and having better opportunities than Gilman & Co. for disposing of them in Japan, suggested to that firm that he should be allowed to do so; and the plaintiff also, having been informed that the defendant's house and another Japanese house could sell composite steamers, forwarded the information to Gilman & Co. in a letter of the 10th of September, In the result Gilman & Co. authorized the defendant to sell the vessels; or, in the event of their not being sold, to find employment for them. The defendant undertook this duty, and the plaintiff corresponded with the defendant's manager at Nagasaki on the footing of the defendant having so undertaken it.

On the 23d of October, 1868, the plaintiff wrote to Gilman & Co. confirming a limit which he had previously mentioned for the price of each of the vessels, namely, \$90,000 net proceeds in England, and stating his willingness to allow some portion, suggesting one-third, to remain on credit if good interest were allowed and covered by the guarantee of Gilman & Co.; and on the 5th of November in the same year the plaintiff wrote again to Gilman & Co., withdrawing the requirement of a guarantee from them, and expressing his 289 willingness to allow a credit, if \*necessary, of \$20,000 or \$25,000, for six or nine months, secured on the vessel. The defendant, however, asserted that he was never made acquainted with the fact of the plaintiff's willingness to allow a credit, and that the instructions which were conveved to him by Gilman & Co., as coming from Willis & Son, were to the effect that only cash was to be taken for the steamers. The evidence on this point was not clear, but the Court of Appeal considered that nothing really turned upon it, and in their judgment assumed the defendant's assertion to be

For some time prior to the defendant's employment in connection with the two steamers he had business relations with the prince of a Japanese district called Geyshien, and the prince had become indebted to him in certain moneys,

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some of which were payable by him in 1868 and some in This Japanese prince was desirous of becoming the purchaser of a steamer, and the defendant appears very early to have conceived the notion of selling either the Nymph or the Columbine to him. In the latter part of the year 1868 and the early part of 1869 several letters passed between the defendant and members of the firm of Gilman & Co., in which the difficulty of obtaining cash for the vessels was stated by the defendant, and in which he suggested that he should himself become the purchaser, with a view of reselling on credit. Gilman & Co., in their answers to the defendant, did not appear indisposed to accede to his suggestion, provided the plaintiff's limit of \$90,000 was obtained; but in the opinion of the Court of Appeal the correspondence failed to establish that any definite arrangement was come to until a date later than the 18th of March. 1869. It appears, however, that before that date the defendant had brought his negotiations with the officers of the Prince of Geyshien for the sale of the Columbine by him to the prince to a close; and on the 24th of February, 1869, an agreement in writing between the defendant's firm and the prince's officers was signed at Osaca, under which the defendant was to receive \$160,000 for the vessel, payable as to \$75,000 in cash, and as to the balance in two equal instalments in the fourth and eighth months of the current year according to the Japanese reckoning, that is, in the months of May and Sepember, 1869. The contract was subject to confirmation by the Geyshien government, \*and complete possession of the vessel was not to be given over until full payment was received.

On the same day a further agreement between the same parties was signed, under which, in consideration of the purchase of the steamer, it was arranged that the prince should pay to the defendant in the second month of the year 22,400 rios due in the third month, in the third month 23,000 rios due in the fourth month, and in the eighth month 30,723 rios due in the tenth and eleventh months of the pre-

ceding year.

These agreements were alleged by the defendant to have been mere inchoate arrangements, which were subsequently cancelled; but on the 17th of March, 1869, two final agreements were concluded between the same parties, which are in substance to the same effect, except that possession of the ship was to be given on payment of \$75,000, while the bill of sale was to be retained until payment of the whole purchase money.

These agreements being executed, the crew of the Columbine was discharged, possession of the vessel was given to the prince, and on the 25th of March, 1869, a formal transfer to a trustee for the prince and the defendant was executed by the defendant. During the period over which the transaction with the prince extended, Mr. Hunt, the manager of the defendant's firm at Nagasaki, was corresponding from time to time with the plaintiff, mainly on matters of business unconnected with the sale of the Columbine, but incidentally also upon the subject of that vessel; and in a series of letters coming down to as late a date as the 8th of April, 1869, Mr. Hunt invariably spoke of the sale of the vessel as about to be effected, or as having been effected, by the defendant under his employment for that purpose, and there was no intimation of any intention on the part of the defendant, either conceived or carried out, to change his position of agent for that of purchaser. In a postscript to a letter of the 10th of March, 1869, Hunt wrote as follows:-"Since writing the above we are in receipt of advice from our Hiogo friends, who state that they are finding constant and remunerative employment for the Columbine, and that she was about to proceed on a trip to the Inland Sea for the purpose of being inspected with a view to purchase."

291] \*In another letter to the plaintiff, on the 8th of April, 1869, Hunt mentions the fact of a sale having been

effected in the following terms:—

"Columbine. This vessel has been sold. Particulars regarding the sale Messrs. Gilman & Co., of Shanghai, will doubtless give you by this mail. Our firm at Osaca have informed these friends about this subject. Captain Lobnitz (of the Columbine) is proceeding home by this mail."

It was admitted by the defendant that Hunt was ignorant of the nature of the transaction which resulted in the sale

of the ship to the prince.

In the correspondence between Gilman & Co. and the defendant, Gilman & Co. treated the defendant as their agent for the sale of the ship, until some time after the transaction had been completed.

On the 12th of March, 1869, the defendant, in the name of his firm, wrote to Gilman & Co. at Shanghai as follows:—

"We beg to advise having settled a sale of the steamer Columbine, which will enable us to remit you the net limit given our Mr. Alt for the vessel by you. Mr. Lavers and we hold to your credit 3,000 dollars as a deposit on account of the same, which will be forfeited should the arrangements

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we are making fall through, which please note. Our senior addresses Mr. Lavers on this subject, to which we refer you. Please hand us by return the necessary documents to make a legal transfer of the vessel, as we may have to give a bond to the consul here if we require to change the flag before such is received by us."

At the same time the defendant wrote a private letter to Mr. Lavers, one of the partners in the firm of Gilman & Co., as follows:—

"We now write officially to say we will take the Columbine over at the limit named in your letter of the 10th of December, which I hope will be satisfactory, and show you that I have been correct in my ideas as to the sale of the steamers, and induce you to be a little patient with reference to the Nymph, which I am sure we shall be able to settle very soon now. Please let me have transfer \*docu- [292 ments by return, made out in the name of W. J. Alt. We shall remit you 90,000 dollars, less our 5 per cent. commission, which we will divide with you in this instance, or will hand your Yokohama firm the equivalent of 85,000 dollars at 4s. 6d., plus your commission of  $2\frac{1}{2}$  per cent., which comes to nearly the same thing."

On the 18th of March Mr. Lavers replied:—"Yours of the 12th of March reached me yesterday, and I am much pleased to hear that there is at last some chance of selling the Columbine, although, at the price you name, 85,000 dollars, it cannot be done. By my letters of 20th January to your firm, and 21st January to you, you will not fail to notice that the limit given on these dates was 90,000 dollars, free of commission. Our commission would be 5 per cent, but we should be quite content to divide this with you, say give you 2½ per cent. The steamers would be dirt cheap at this price. We cannot accept 85,000 dollars net with an addition of 2½ per cent. as our commission. Our last instructions from Mr. De Bussche are as follows: 'London, 4 March. The limit on the Columbine and Nymph at 85,000 dollars net in England, with the £200 per month added since 1st September for insurance and interest. No deduction from above price of any earnings.'"

Further correspondence took place between the defendant and Gilman & Co.; and although the latter appear ultimately to have acquiesced in the purchase by the defendant of the Columbine at the limit given by the plaintiff, there was nothing to show that they were aware of the terms of

25 Eng. Rep.

resale, or of the fact that the defendant had completed the arrangement for resale before he bound himself to become a purchaser. And Mr. Lavers stated in his cross examination that he was himself ignorant of the terms on which the vessel had been resold.

In the meantime Gilman & Co. were also in correspondence with the plaintiff, and in all their letters to him they spoke of the defendant as acting as an agent in the sale of the vessel. On the 17th of March, 1869, they wrote as follows:—

"We have just received later advices from Hiogo, under date of 12th instant, by which we are glad to find the Jap-293] anese had \*entered into positive negotiations for purchase of the Columbine, and paid a small amount of money as a guarantee of their good faith in the matter; so that we trust a telegram will reach you in anticipation of this letter, advising actual sale of the steamer on satisfactory terms."

On the 30th of March, 1869, Gilman & Co. wrote to the plaintiff as follows:—

"Columbine. On the 17th inst. we wrote you that our friends in Japan had advised us that the steamer was in a fair way of being sold. We have since heard from them to the effect that as they found so much difficulty in making a sale at any price for prompt payment, they will take the steamer over at 90,000 dollars. . . . You will no doubt understand it is unusual to sell steamers to the Japanese for cash, payment in most instances extending over some time; our friends make the above offer, not having actually sold the steamer, but are in hopes of making a resale on credit terms, at a profit sufficient to reimburse them for loss arising out of interest of money, &c."

On the 12th of April, 1869, Gilman & Co. communicated the sale of the vessel to the plaintiff in the following terms:—

"Columbine. We telegraphed our friends in London on the 8th inst., to advise Willis & Son that this steamer had been sold for 90,000 dollars. Messrs. Alt & Co. had effected the sale before receiving our advices communicating your increased limit, to cover £200 per month for marine insurance. As, however, the price obtained is net, the difference is fortunately small, and the 90,000 dollars we shall have pleasure to remit you will nearly cover the amount required for insurance in addition to your former limit of 85,000 dollars. The steamer was transferred at Hiogo, where she was sold on the 21st ult., as advised in our telegram."

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However, on the 3d of June, 1869, Gilman & Co. wrote to the plaintiff a letter which contained the following passage:—

"We have now to ask you for our commission on the sale of the Columbine. You are aware that the steamer was worked by Messrs. Alt & Co. in Japan, who afterwards took her over for your limit of 90,000 dollars."

\*About the same time, the plaintiff having received [294 some intimations from Japan which aroused his suspicions as to the conduct of the defendant in the matter of the sale, placed himself in communication with a Mr. Pitman, who had been captain of one of his vessels, and with Messrs. Walsh & Co., of Nagasaki, for the purpose of obtaining information upon the subject.

On the 17th of April, Mr Pitman wrote to the plaintiff from Yokohama a letter, in which he stated that he had been given to understand that the Columbine and Nymph had

been sold for about \$160,000 each on credit.

Messrs. Walsh also wrote on the 17th of April, and informed him that they had heard that the Columbine was sold to the Prince of Geyshien for \$175,000, mostly on credit, though the reputed sale price at Hiogo was only \$90,000.

On the 14th of May Messrs. Walsh, in a further letter,

wrote as follows:-

"Columbine. I had a long talk over the sale of this steamer with Mr. Alt, and he showed me Messrs. Gilman's letters, in which they insisted on a cash sale, and would not listen to his proposals of credit, although he pointed out that there was not a single instance on record of a Japanese prince not acting up to his engagements. Finding that they were bent on an immediate cash sale, he says he could do no better than sell her at the price of 90,000 dollars. He takes the risk of a five years' credit from the Japanese, and gets (he did not tell me the exact sum) about 175,000 dollars. These circumstances appear to have been known to Gilmans, as they held the papers and received the 90,000 dollars, and it was at their option to accept or reject the sale."

Upon this information the plaintiff wrote to Gilman & Co. on the 30th of July, 1869, as follows:—

"I must draw your attention to the sale of the Columbine. I see the result, so far as the remittance is concerned, is £20,500, but this is not the net price free of all charges, disbursements, and commissions, as given by me in my letters of the 25th September and 5th October. I particularly stated free of all disbursments, charges, commissions, &c.,

that I might receive that sum in full, but I find now that a 295] sum of £1,100 has been \*debited to her, and I gave it that I might be sure of a certain sum as the result of the sale. When a sum of £1,100 is deducted, it makes a considerable difference; however, I must receive it and be content with the sale, though it is quite against my particular limit on the vessel. The Messrs. Alt & Co. have made a good bargain, and I think should not only pay you your commission, or divide, which I am told is the custom, but pay the above £1,100. 90,000 dollars for a vessel like the Columbine is as low a price as they could possibly give."

The sum of \$90,000 was paid or accounted for by the defendant to Gilman & Co., and by them paid to the plaintiff or his mortgagees. The defendant received the agreed price from the Prince of Geyshien in the following manner: \$75,000 in various payments upon the 13th of April, 1869; \$4,000 on the 18th of September, and the value of the balance of principal and interest amounting to \$93,750 in December, 1869, in rice, which the prince had agreed to transfer to him. The defendant stated that he obtained the balance at considerable risk and expense to himself, and had been obliged to enforce his claim by a visit to the prince's capital in a large American steamer.

The defendant, in December, 1870, dissolved his connection with his firm of Alt & Co., and in November, 1871, came to England, where he from time to time met the plaintiff without hearing from him any complaints upon the subject of the sale of the Columbine. It was, however, proved that the plaintiff did not receive from him or any other person any further information as to the terms of the sale of the Columbine, beyond what had been given by Mr. Pitman and Messrs. Walsh & Co. The plaintiff took no proceedings in the matter till March, 1873, when he required from the defendant to account, as his agent, for the purchase-money received by him for the Columbine, and on the 10th of April, 1873, he filed the present bill, praying a declaration that the alleged purchase by Alt & Co. of the Columbine on their behalf was fraudulent and void, and that the defendant might account to him for all moneys paid to him

or his firm in respect of the sale of the ship.

In his answer to the bill the defendant alleged the existence of a custom as to the dealings of agents abroad, in the 296] following \*terms: "It is the common practice where ships or other articles of commerce are consigned by merchants residing in England to their foreign agents for the purpose of sale, for the principal or consignor to fix a limit

or reserved price as the minimum amount for which such ship or other article is to be sold, or as to merchants in Japan. at the minimum at which such may be taken over, or taken to and purchased by the merchant. It is, I believe, the fact that such limit or reserved price is not intended by the principal or regarded by the agent as relieving the latter from the obligation of disposing of the article consigned to him for sale at the highest price which he can obtain for it, or from the obligation to account for the full proceeds of sale except where he informs the principal or consignor, or other person for whom he is acting, that he takes to or purchases it at the price named, and such principal or other person agrees thereto, in which case the agent is wholly relieved from any and every such obligation as aforesaid, and has simply to pay or otherwise satisfy the price or sum named, like any other purchaser, and deals with and disposes of the ship or other article as he best can and thinks most desirable. for himself for his own benefit."

The plaintiff having amended his bill, the defendant put in a further answer, in which he said, "I crave leave to refer to the practice or custom stated in the 12th paragraph of my former answer, and say that not only is there such practice or custom as therein stated, and that the same is, as I submit and believe, a good valid and commercial custom; but it is also a further common and usual custom and practice in China and Japan, and one which I believe and submit is also a good and valid and commercial custom, for goods to be taken over by commission agents as well as merchants, at the limit placed upon them by the consignor or principal, provided that price is not then below the then cash market value of the goods, and that even without any mention being made of the fact or notice thereof given to the consignor or principal, and the goods or price thereof are accounted for and remitted, and commission charged in the same way as if they had been sold to third parties."

The cause came on for hearing before Vice-Chancellor Hall

on the 18th of June, 1877.

\*The documentary evidence on both sides was very [297 voluminous, and several witness were examined on both sides in court.

Dickinson, Q.C., J. C. Mathew, W. Barber, and Pollard,

for the plaintiff.

Butt, Q.C., Bristowe, Q.C., and T. A. Roberts, for the defendant.

Dickinson, in reply.

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HALL, V.C., in the course of Mr. Dickinson's argument in

reply, said:

I do not desire you to address yourself to that part of the case which relates to an alleged custom, because, having read the evidence and the pleadings, the conclusion I have arrived at is, that a custom is not proved, and certainly not the custom averred, and that being so, it may be a matter for consideration whether the case which is now made on behalf of the defendant with reference to an authorized transaction distinguished from custom is really open to him. It may be questioned whether it was competent to the parties, having set up the defence of custom, to fall back and contend that this was a transaction which was authorized by the plaintiff, through his duly appointed agents. the proposition, that Gilman & Co., failing the custom, were agents so far authorized as to employ an agent, giving him authority to do that which in two points of view it may be considered it was at first supposed that Gilman & Co. could do themselves, if they thought proper, if they had no agent, and next, supposing they could not do it themselves, that an agent authorized by them might do it, that is to say, they had authority to give to an agent that especial right to take over the goods at a limit. These are considerations which, it seems to me, are not unimportant in the case. conceive to be the position of the parties is this, that Willis & Son and the plaintiff jointly arranged that Gilman & Co., who had acted for Willis & Son in other transactions, should in this matter have the consignment of the vessel, and should act in substance as consignors for both parties, and that the price in reality to be given was substantially left to the plaintiff, because in their very first letter they mentioned \*that they believed that De Bussche wanted so much for her, but he would probably take so much. So that. there being property in this case which was no doubt amply sufficient security to cover Willis & Son, they left, in other respects, the disposal of the vessel in the hands of De Bussche, and therefore there were communications made, almost from the beginning of the transaction, not with Willis & Son, but with De Bussche. Then as regards the sale, whether it was to be for cash or credit. The impression on Gilman & Co.'s mind seems to have been that the plaintiff would not have accepted a sale except for cash, and that he did not want complicated arrangements. But at the same time, although that might be so, yet there might be proposals made in reference to a sale, although not all for cash. It might probably have been refused by Willis & Son if it had been

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brought to their attention, but unquestionably as regards the sale for cash, so far as De Bussche and his interest and authority were concerned, I do not upon the whole consider that cash was, under all the circumstances, a sine qua non.

His Lordship subsequently said:

Since yesterday I have been able to give considerable time to this case, and although I then was of opinion that it might be more satisfactory to hear further arguments on some of the points, I have since been able to consider them, and to look at the authorities which were referred to, and I will now dispose of the case. I stated yesterday shortly what I considered was the real position of the parties in reference to the sale of the Columbine, and the instructions for it, and what I thought in reference to the instructions which were given by Willis & Son and by the plaintiff, either through Willis & Son or otherwise, and I do not think it necessary to go through that again; and what I said must be considered as part of my judgment. I have, however, again looked at the letters and the matters bearing upon them, and the result of further consideration confirms what I have stated before, and I will only say on this head that it appears to me plain, upon the correspondence, that there were no specific instructions from Willis & Son not to sell on credit, and there were instructions from the plaintiff consisting of a number of letters, which at all events did not absolutely forbid, but which previously to the actual transaction authorized a sale on credit.

\*The plaintiff seems to have desired, if there was a sale on credit, to have had the guarantee of Gilman & Co. for the payment; but it also seems that he afterwards relaxed that, and would have been willing to sell on credit to a limited extent—to an extent within the margin of the actual sale which took place by the defendant, upon having a security upon the vessel, about the giving of which it does not appear that there would have been any real difficulty. That being the state of things, however, it is right to say that Gilman & Co.'s view was that a sale for cash was the proper thing, and they considered, as representing their principal—and they were quite right in taking that view that it should be a sale for cash. They did not trust the native princes, although Alt & Co. had great confidence in them, and thought they would ultimately pay, although they wanted time. The price was left substantially to the plaintiff to fix. It is not an unimportant consideration in reference to the transaction generally, to remember that Willis & Son never authorized any sale, and must not be

considered likely to sanction one, except for cash, and that Gilman & Co., as their agents, in exercising their judgment, would not be ready to sell except for cash. It is admitted that it does not appear that Gilman & Co. knew the amount that was owing to Willis & Son, and I think it is not unimportant that the amount of the purchase-money to be paid in the case of the Columbine formed so large a proportion of the debt owing to Willis & Son. It was quite plain that Willis & Son were safe, and covered by what would be realized from the Nymph, whatever that ship might produce, and it would be something substantial, no doubt. It might be said Gilman & Co. did not know what the amount owing on the current account was, and there were some difficulties in communicating with Willis & Son and getting instructions about it. Therefore I shall deal with the case upon the footing of Gilman & Co.'s exercising a sound discretion in considering that the sale ought to be for cash, they having to protect Willis & Son, from whom they had not specific instructions to sell for credit; and that is all, so far as it goes, in favor of the defendant's view of the matter; and, it has been truly said, it does not appear that the defendant was made aware of this particular direction from De Bussche to sell on credit to a certain extent; therefore, 300] \*as he had been told over and over again that the sale should be for cash, he must have the benefit of that, as it was considered by him that there must be a sale for cash as far as Gilman & Co.'s clients or correspondents were concerned.

I will now consider the different points which have been raised on behalf of the defendant. On the very threshold of his whole case, is the contention that he is only accountable to Gilman & Co. [His Lordship then referred to the pleadings and the evidence, and continued:] When it is said that the defendant is answerable only to Gilman & Co., it must be remembered that they make common cause with him, of which I do not at all complain. They thought, as they say, they were honestly and fairly acting for their principal. Taking that view of the case, it is manifest that it would really only come to this, that Gilman & Co. would not enforce their claim against the defendant even for the That being so, if it were necessary plaintiff, their principal. that Gilman & Co. should, in point of form, be the actors in calling on the defendant to account, it would only have been necessary that the plaintiff should have taken proceedings for liberty to use Gilman & Co.'s name as against the defendant, a mode and form which, under the circumstances

of the case, I conceive it was quite unnecessary for him to But independently of that, the authorities which were referred to do not at all support the proposition that there would be no right under such circumstances for the person aggrieved to go directly against the agent who had profited by the transaction—who was an agent of somebody, and instructed in the matter of the transaction, and who, according to the case alleged, had got, in reality, in his pocket what was the plaintiff's money. On the contrary, the paragraphs in Story on Agency (') which were referred to, taken in connection with some others, support the view that the principal may go against the ultimate agent under such circumstances.

The next contention was the alleged custom. The defendant justified his transaction by referring to an alleged custom, and as regards that I have said already that I think it is not, as a matter of fact, by the evidence, which has been given viva voce as well as by affidavits, made out. I come to the conclusion that such a \*custom has not been [30] proved, and it must be proved upon the most clear and unquestionable evidence. It is against all the principles of the administration of justice, which are founded upon the necessity of rules, such as are enforced in this court, as between principal and agent for the purpose of protecting the principal not merely against the actual positive wrong of the agent, but also against those possible wrongs of the agent which it is so difficult and almost impossible to ascertain; for it is almost impossible to dive sufficiently into all the motives and knowledge on the part of the agent which it is necessary to think of in considering whether he has acted in the discharge of his duty as agent. It appears to me the correct conclusion is that there was no such custom as that alleged in the first answer, which is the simpler of the two; and as regards the second custom, that the evidence falls much short of establishing it. As regards the custom alleged in the first answer, the allegation is, that "it is the common practice when ships and other articles of commerce are consigned by merchants residing in England to their foreign agents"—not confined to any one country—"for the purpose of sale for the principal or consignor to fix a limit or reserved price as the minimum amount for which such ship or other article is to be sold, or as to merchants in Japan as the minimum at which such may be taken over or taken to and purchased by the merchant. It is, I believe, the fact that such limit or reserved price is not intended by

the principal, or regarded by the agent, as relieving the latter from the obligation of disposing of the article consigned to him for sale at the highest price which he can obtain for it, or from the obligation to account for the full proceeds of sale, except where he informs the principal or consignor or other the person with or for whom he is acting that he takes to it or purchases it at the price named." Now observe. "And such principal or other person agrees thereto, in which case the agent is wholly relieved from any and every such obligation as aforesaid, and has simply to pay or otherwise satisfy the price or sum named like any other purchaser, and deals with and disposes of the ship or other article as he best can and thinks most desirable for himself and his own benefit." At all events, according to that there should be the assent to the transaction of the principal or 302] consignor or other the person with or for whom \*he is If there were such a custom it would have been necessary to state that the agent communicated with the principal whoever that may mean in this particular case, or the consignor or other the person with or for whom he was There must be the assent of the principal or other person thereto, but of course such principal or other person could not assent thereto without knowing all the circum-That is necessarily involved, and it is not made out here that the principal or consignor, or other person, did assent thereto, even if that principal, consignor, or other person be taken to be Gilman & Co. as distinguished from the plaintiff. I think that such a custom as that would be construed very strictly; and inasmuch as this could not have been a taking over within that custom by Alt & Co., if it had been a taking over by Gilman & Co., the original agents, they must have communicated with their principal, and in like manner there ought to have been a communication with and an assent by the principal—the plaintiff—and not merely with the person who was not in reality himself acting in the matter of the sale, although he was the person They put somebody else in the posiauthorized to do so. tion of agent for sale instead of themselves, they having nothing more to do with the transaction apparently after that, than to receive the money, assuming that the persons so substituted—Alt & Co.—would do their duty in the mat-However, it is not necessary to determine whether, if there could be such a custom, the assent of Gilman & Co. would do, because in fact they did not assent, first, for want of knowledge, and next, because they took a mistaken view entirely with reference to that custom. These considera-

tions are really unimportant. I cannot reconcile the first custom, which requires the assent of the principal, with the other custom alleged in the second answer, which requires no assent at all, and the inconsistency between the two goes far to show there is no such custom. It is too loose to be considered a custom at all; and in reference to a custom it is not unimportant to bear in mind, in an attempt to establish a known and recognized custom contrary to, and at variance with, the general rules in equity and rights at law as between principal and agent, that Japan was the place where the transaction of the sale took place, a country which had established commercial relations with other countries only a \*very few years antecedent to the time when [303 the transaction took place.

The next question is: Has the defendant a case irrespec-

tive of custom?

Upon the evidence there is no trace of any authority given by the plaintiff to Gilman & Co. that they might take over at a price, nor is there any trace of any authority given to them that they might appoint an agent and authorize him to take over at a price. The question is, had Gilman & Co., without express authority in one or other of those respects, authority to do so? I consider that if Gilman & Co. could not do it themselves, neither could any one put into their place for the purpose of a sale; and also that it was not competent to them to give to any person who was to act in their place in respect of the sale any greater latitude of right in reference to selling to himself than they had to sell to themselves, and therefore, on that ground it seems to me that the case must fail. Is it to be said that the sub-agent was instructed to sell and was at the same time authorized to take over at a price, that he did take over at a price, and that he told Gilman & Co., and that Gilman & Co., exercising a judgment upon it, thought it was for the benefit of their principal that that should be allowed to take place, and that the transaction was therefore indisputable? In support of that the defendant's case is that he had ceased to be or to occupy the position of agent, and that he became Excepting an affidavit that he ceased to be the purchaser. the agent and became the purchaser, which is merely a mode of describing the transaction according to the view of the defendant, there is no evidence to that effect whatever. The fact is, there was no cessation of agency on the part of Alt up to the time when he sent a letter saying he took the ship at that price. That it was not deemed entirely hopeless that he would find a purchaser for cash is manifest, I

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think, because there is one letter in which Gilman & Co. mentioned that they still hoped it might be so, notwithstanding it was very difficult, if not almost impossible, to sell, except on credit. The difficulty of the position of the defendant was to discharge a duty in endeavoring to find a purchaser for cash, and at the same time in looking out for a purchaser on his own account so as to give him a profit if he \*did take over the ship at the price; those were two such inconsistent things that it is impossible to consider that a purchase under such circumstances by the second appointed or deputy agent was a transaction that could stand according to the law of this court. It seems to me, therefore, according to the plain principles upon which this court acts, that the agent so appointed by Gilman & Co. was, under the circumstances, not selling according to what the defendant says were the instructions of the principal to sell for cash, but was departing from those instructions without express authority from the principal, and selling in a different manner; because he says he could not sell in the way in which he was directed; and doing that with a view to his own advantage and gain. How can it be contended that if a profit results from that transaction, that the agent is not liable, upon the ordinary principles of equity, in respect of all profit made by him? The agent must be liable to somebody, and as Gilman & Co. repudiated it, the original principal must be able to enforce payment of that which is his own money. Every agent must account for all profit which he makes out of a transaction, and cannot put it into his own pocket, and profit was made by Alt, an agent, and therefore it must be accounted for. Gilman & Co. did not release him from that accountability, and, as I hold, they could not, and never did, release him effectually from any liability, and being accountable for that profit, upon the ordinary principles of equity, it is recoverable by the plaintiff, who in some way or another must be able to get that which belongs to him, and whether coming direct to him or through Gilman & Co. is a matter to which I need not refer.

That being the principle with regard to accountability, it does not seem to me to be necessary to go with particularity into the question whether or not there was a binding agreement to sell the ship to the prince antecedent to the time of the communication. That there had been that which amounted to an agreement in a sense though some of the conditions could not be carried into effect: but that there was every probability—almost certainty—of there being an agreement actually come to, is, I think, manifestly clear. If

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there was not such an agreement come to, at all events the state of things was such that Alt's judgment and course of \*conduct in his dealing with reference to the ship [305] were so fettered, warped, and influenced by what he was doing with the prince on his own account, that, if it were necessary to take that into consideration, which under the circumstances I do not think it is, I should hold that under all these circumstances, having regard to his position, he was disqualified, and not able to discharge himself of the duty of agent. He could not say, I will take it under these circumstances for myself as purchaser. I will throw off my duty to the principal and endeavor to find a purchaser for myself. It is not unimportant, in considering the question of whether a purchaser could have been obtained for cash, to look at all the circumstances of the sale to the prince; but I decide the case on general principles, which disentitle Alt to assume and take the position of purchaser. That he never disclosed to Gilman & Co. the real transactions or the negotiations between himself and the prince is plain. It is quite clear that the price was not known until the time when the discovery was obtained in this action. Some attempts were made to learn, and communications were made with reference to the price to Mr. De Bussche, and those communications being received, he on one or more occasions said he thought Alt had made a very good thing out of it; but some of his expressions may mean that he thought the defendant had got the ship at a very low price; others, having regard to the information that he had got as to what the price was, may have had reference to that particular price. But that information was in reality all more or less inaccurate. De Bussche, having more or less imperfect information in reference to the transaction, made those observations, but was not able to exercise any judgment as to whether he would affirm or disaffirm it, or question the purchase by the defendant. He being in that position might be willing to say, "As to the transaction, as far as I know of it at present, I do not know that I shall find fault with it. course the money which has been actually transmitted to England in respect of it belongs to me, there is no question about that, but whether I am entitled to any more, at present I do not put forward a claim to it." But not putting forward a claim to it may be consistent with his saying, "Well, although I might be willing to sell on credit for a term, with a certain amount to be paid down and a certain amount to \*stand over for some time, I never would have sold [306]

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for five years' credit, and I would rather have had my \$90,000 at once and affirm the whole transaction."

Those observations tend to show this, and which I think is the correct view, that in such a state of things the plaintiff is not preluded by anything that has taken place from asserting his claims. The want of real information would have prevented his making a claim; I think what is called acquiescence is out of the question. In fact the term is inapplicable; what was said by Lord Cottenham in the Duke of Leeds v. Earl Amherst (') shows there was no acquiescence in this case. It may amount—and that is really what the defendant, in order to make out a case upon the ground of acquiescence or laches, ought to establish-to a release to claim the profit. The law gives to the principal the profit made by the agent. But as to his affirming the transaction of the sale, that was a thing which he was not called upon to do, and he could not have effectually done because the ship was handed over in March and put in the possession of the prince or his officers; and although the actual transfer of the ship was delayed until September for the want of papers from the proper authority to get rid of the mortgage, and so forth, the thing had substantially gone out of the possession of Gilman & Co. and Alt & Co. The plaintiff was at liberty, instead of disaffirming the transaction, to say, "All the profit belongs to me, and I shall claim the benefit of it, and I mean to do so." His not saying that he did mean to claim the profit was no wrong or injury in reality to the defendant. It is not a wrong in the ordinary sense of allowing a party to deal with a subject-matter in a way that leads him to suppose his dealing with it will not be called in question, because affirming the transaction and not disaffirming it only leaves the defendant in the position of an acounting party for the profit which he actually made out of the transaction. It appears to me upon every ground there has never been that acquiescence or release of right with knowledge of the actual circumstances of the case which would disentitle the plaintiff to assert his right to what otherwise belongs to him, namely, an account of the 307] profits made by his agent out of the transaction \*on the sale in question. It has been said that it is very hard upon the defendant; that he had a great deal of trouble to get the money; in fact, that he had almost to go to war with the prince. That may be. But the defendant must be taken to have done all that with a knowledge of his accountability, and all proper disbursements and expenses which

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he may have, or which may have been, properly incurred in reference to getting the proceeds of the sale by him from the prince, will of course, in taking the account be allowed. Therefore the result is that the defendant must personally account to the plaintiff for all moneys received by or on behalf of the firm of Alt & Co. from the purchasers of the steamship Columbine in respect of the sale thereof effected by him. There must be an account of all moneys which he has received in respect of the sale, and an account of all moneys which have been paid by the said firm to the plain-tiff "in part payment of the purchase-moneys received by the same firm or any member thereof in respect of the said sale of the said steamship, and that after allowing to the defendant the proper commission and other usual agent's charges, the defendant may be ordered forthwith to pay over to the plaintiff the balance. And in taking these accounts all proper allowances must be made to the defendant in respect of any disbursements or expenses properly made or incurred by him in reference to the sale. Although these would be payable without being specifically mentioned, he must be entitled to every reasonable and proper disbursement which he has incurred, so as to ascertain what is the fair and clear profit derived from the transaction; and the plaintiff must have his costs up to the hearing.

From this decision the defendant appealed. The appeal was heard on the 10th and 11th of December, 1877, and the 14th, 15th, and 18th of January, 1878.

Butt, Q.C., Bristowe, Q.C., and T. A. Boberts, for the appellant: We contend in the first place that the defendant Alt was not the agent of the plaintiff but of Gilman & Co., and was only accountable to them. There was no privity from first to last between the plaintiff and Alt. Therefore, if the plaintiff has any \*ground for relief, [308 he must proceed against Gilman & Co., who were his own agents. In the second place, the transaction was a perfectly fair and legitimate one. Gilman & Co. had authority from the plaintiff to sell to any one for cash at a certain price, and therefore to let Alt take the ship for cash at that price. That Gilman & Co. had employed Alt to look out for a purchaser could not take away their right to sell to him, nor his capacity to purchase.

[JAMES, L.J.: Is there any authority for the proposition

that an agent cannot sell to a sub-agent?]

The Vice-Chancellor held that an agent cannot sell to a sub-agent, but we do not know of any authority for the

proposition, and we submit that it cannot be maintained. The Vice-Chancellor's judgment proceeds on a fallacy: he makes out that Alt sold to himself; but in fact Gilman & Again, he considers that Gilman & Co. Co. sold to him. could have called on Alt to account for the proceeds, but they clearly could not—it was a sale at a fixed price. was not necessary for Alt to inform Gilman & Co. of the negotiations with the Japanese firm for a resale. He was at arm's lenth with that firm, and they knew that he was

trying to sell the ship on credit.

In the third place, the plaintiff is bound by his acquies-The plaintiff received the \$90,000 soon after the completion of the transaction, and he also knew that Alt had sold it for a larger sum partly on credit. He ought to have repudiated the transaction at once or claimed the profits. Although he did not know the whole of the facts he knew enough to put him on inquiry, and, even after he was fully informed, he waited for a long time before he brought forward his claim. His conduct, therefore, amounted to a ratification of the transaction. He has, at all events, been guilty of laches, disentitling him to relief in this court.

Dickinson, Q.C., and W. Barber, for the plaintiff: plaintiff's case rests upon the acknowledged principle that an agent, being in a fiduciary relation to his principal, cannot derive a profit out of the transaction without his principal's knowledge and permission. The defendant was 309] appointed agent for \*the sale of the Columbine by Gilman & Co., and that appointment being communicated to the plaintiff and agreed to by him, the defendant became the plaintiff's agent: Fawcett v. Whitehouse ('); Hay's Case ('); Dunne v. English ('). The defendant says that he discharged himself of his agency before the resale by him to the Japanese firm; but that statement is not borne out by the evidence. Neither Gilman & Co. nor the plaintiff was aware of the resale till after the transaction had been If the defendant had informed the plaintiff that concluded. he could not sell for cash, the plaintiff would have permitted him to sell for credit; and, in fact, he had expressed to Gilman & Co. his willingness to sell on those terms at any rate if the price was guaranteed by the defendant. There is no evidence of such a custom as is set up by the defendant in his defence, for an agent in Japan to take the goods

<sup>(\*)</sup> Law Rep., 10 Ch., 593; 14 Eng. R., 837.

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himself at the market price, or at the minimum price named by the principal, without his consent. Such a custom would be unreasonable, and could not be acknowledged by the

English courts.

The defence of acquiescence cannot be supported, for the plaintiff knew nothing of the transaction till after it was concluded. Therefore in order to bind him there must be such acquiescence as amounted to accord and satisfaction, or to a release of his rights: Duke of Leeds v. Earl Amherst('). Nothing of that kind has been shown here, nor has there been any delay amounting to laches.

Butt, in reply.

1878. March 12. Thesiger, L.J., delivered the judgment of the Court (James, Baggallay, and Thesiger, L.JJ.).

After stating the facts of the case as given above, his

Lordship continued:

Upon this state of facts the learned Vice-Chancellor decided that the plaintiff's claim to receive any profits made by the defendant out of the transaction of the sale of the Columbine was well founded, and decreed the necessary account for the purpose of ascertaining those profits. that decree this appeal is \*brought. In support of [310 the appeal it has been contended on the part of the defendant, first, that the relationship of principal and agent was not constituted between the plaintiff and the defendant; secondly, that even if it were at one time constituted, the relationship ceased before the sale of the Columbine took place; and thirdly, that assuming the defendant to have been at one time constituted, and to have continued throughout the transaction of sale, the agent of the plaintiff, the latter has lost by acquiescence any right to follow the profits made by the defendant out of it.

The first contention raises a question which, as it appears to us, does not present any difficulty. As a general rule, no doubt, the maxim "delegatus non potest delegare" applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analyzed merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such author-

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ity cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed "a sub-agent" or "substitute" (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for want of a better, and for the sake of brevity); and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the 311] employment, unforeseen \*emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself. The law upon this point is accurately stated in Story on Agency ('). A case like the present, where a shipowner employs an agent for the purpose of effectuating a sale of a ship at any port where the ship may from time to time in the course of its employment under charter happen to be, is pre-eminently one in which the appointment of substitutes at ports other than those where the agent himself carries on business is a necessity. and must reasonably be presumed to be in the contemplation of the parties; and in the present case, we have, over and above that presumption, what cannot but be looked upon as express authority to appoint a substitute, and a complete ratification of the actual appointment of the defendant in the letters which passed respectively between Willis & Son and the plaintiff on the one side, and Gilman & Co. on the other. We are, therefore, of opinion that the relationship of principal and agent was, in respect of the

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sale of the Columbine, for a time at least, constituted between the plaintiff and the defendant.

Next arises the question whether that relationship ceased before the actual sale of the vessel, and upon this question also we are of opinion that the contention of the appellant must fail. In the first place it is clear that down to the time of the sale the plaintiff was no party to any termination of the defendant's agency, and we think that Gilman & Co. could not, after having once appointed and allowed the defendant to act as agent for the plaintiff in connection with the proposed sale of his vessel, and without any authority from the plaintiff, change the defendant's position in the transaction from that of an agent to that of a purchaser from the plaintiff. All the reasons which would apply to prevent the original agent from changing his position without the assent of his principal, would equally apply to the case of the substitute, and if such a transaction were held to be valid so as to \*entitle the substitute to make a profit out of it, [312] it would open the door in a variety of cases to agents, who could not themselves directly become purchasers, indirectly doing the same thing through the intervention of substitutes, and to the commission of serious frauds upon principals. But, in the present case, we are also satisfied by the evidence, to which attention has already been directed, that Gilman & Co. themselves never assented to the termination of the defendant's employment as agent for the sale of the Columbine, never assented to the defendant's taking the vessel himself until after the agreement for her sale to the Prince of Geyshein was complete. When that agreement was concluded the defendant was still, in fact and in law, the plaintiff's agent, and on and from the conclusion of the agreement the plaintiff was entitled to have the benefit of it. and as a consequence has a right to maintain the present suit unless in some by his conduct he has deprived himself of that right.

This brings us to the consideration of the contention of the defendant, founded upon what has been termed "acquiescence" on the part of the plaintiff. It has been urged that the plaintiff ought not to be allowed to impeach the validity of the transaction in question, or to follow the profits made out of it after having, with knowledge that the defendant had become the purchaser of his vessel, assented to the transaction being completed on that footing, received by himself or his mortgagees through the hands of Messrs. Gilman & Co. the purchase-money, allowed the defendant to incur risk and expense which, as agent, he could not have been

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called upon to incur in obtaining payment from the Prince of Geyshein, and finally to dissolve his connection with the firm of Alt & Co. upon (as is suggested but not proved) the footing of his freedom from all outstanding claims, and to return to England and there reside for a considerable period without any intimation of proceedings being taken against him by the plaintiff. It is necessary, however, to bring these circumstances to the test of legal principles. It is competent no doubt to a principal to ratify or adopt the act of his agent in purchasing that which such agent has been employed to sell, and to give up the right which he would otherwise be entitled to exercise of either setting aside the transaction or recovering from the agent the profits derived by him from 313 it; and the non-repudiation \*for a considerable length of time of what has been done would, at least, be evidence of ratification or adoption, or might possibly by analogy to the Statute of Limitations constitute a defence; but before the principal can properly be said to have ratified or adopted the act of his agent or waived his right of complaint in respect of such acts, it should be shown that he has had full knowledge of its nature and circumstances, in other words, that he has had presented to his mind proper materials upon which to exercise his power of election, and it by no means follows that, because in a case like the present he does not repudiate the whole transaction after it has been completed. he has lost a right actually vested in him to the profits derived by his agent from it. It appears to us also that, looking to the dangers which would arise from any relaxation of the rules by which, in agency matters, the interests of principals are protected, the evidence by which in a particular case it is sought to prove that the principal has waived the protection afforded by those rules, should be clear and cogent.

In the present case, so far from the plaintiff having had full knowledge of the nature and circumstances of the transaction relating to the sale of the Columbine, or the evidence of ratification or adoption being clear and cogent, it is apparent that he was kept in entire ignorance of the amount of the purchase-money payable by, and the terms of the credit given to, the Prince of Geyshein, and of the important fact that the defendant had abstained from binding himself as a purchaser of the vessel until he had obtained the contract for her resale. It is to be observed also, that while the plaintiff did not in terms repudiate the transaction by which his vessel was sold, and appears to have grumblingly submitted to it as something which he could not help, he at the same

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time made no statement and did no act from which is to be inferred any condition or stipulation or promise that upon becoming better acquainted with the circumstances of the transaction, he would not enforce his legal rights against the defendant by claiming from him any profits made out of the transaction. We are of opinion, therefore, that there is no such evidence of ratification or adoption on the part of the plaintiff of the acts of the defendant as is sufficient to show that he waived the protection \*given by law, and [314 dealt with the agent quoad those acts, as a person dis-

charged of his agency.

It still remains to be considered whether, short of such ratification or adoption, the plaintiff can be held to have by his conduct in any way precluded himself from taking the present proceedings. The term "acquiescence," which has been applied to his conduct, is one which was said by Lord Cottenham in Duke of Leeds v. Earl Amherst (') ought not to be used; in other words, it does not accurately express any known legal defence, but if used at all it must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the act acquiesced in is in progress or only after it has been completed. If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said in the case already cited, is the proper sense of the term "acquiescence," and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all events as a general rule, cannot be divested without accord and satisfaction, or release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person

injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise would be without

consideration, and therefore not binding.

Applying the principles above enumerated to the present 315] case—\*first, it is clear that there was no acquiescence on the part of the plaintiff in the defendant becoming the purchaser of the Columbine and obtaining the profit of the sale to the Prince of Geyshien, at any time before the sale to the prince was a completed transaction. He said nothing, did nothing, there was nothing which he abstained from saying or doing, by which he induced the defendant to do, or abstain from doing, anything, or to alter his position before the transaction with the Japanese prince was com-Prima facie, therefore, the plaintiff was entitled to bring his action to recover the profit derived by the defendant from the transaction. Secondly, there has been no release by the plaintiff of his right of action, or anything which could be held to amount to accord and satisfaction. Thirdly, assuming that under certain circumstances a person might, by his conduct, whether constituting laches or amounting to an estoppel, entirely preclude himself from enforcing a vested right of action, yet, in the present case, no conduct having that effect can properly be imputed to the plaintiff. He made no representation to the defendant that he would not take proceedings. Even if his conduct could under any circumstances be held to have been equivalent to such a representation, or to constitute laches, it was pursued, as already pointed out, in ignorance, due to the defendant's own concealment, of the terms of the sale to the Prince of Geyshien, and especially of the fact that such sale preceded the purchase by the defendant; and, lastly, the principal element of an estoppel by conduct—namely, that it should have been pursued with the intent or so as to induce the person relying upon the estoppel to act in a particular manner-is here wholly wanting; for the plaintiff was quite unaware, until after the defendant's answer to the suit was put in, that the defendant had run any risk or incurred any expenses in obtaining payment of the price stipulated to be paid by the Japanese prince. We are of opinion, therefore, that the plaintiff has not by his conduct in any way precluded himself from taking these proceedings.

In dealing with the case we have put aside one topic which was discussed in the argument for the appellant, but which is beside the real questions between the parties, namely, the

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righteousness or unrighteousness of the transaction im-The \*law under which an agent is prevented from making a profit out of his employment by acting as a principal instead of as an agent is wholly independent of considerations of this kind, and it is most important in the interests of commercial honesty in general that the honesty of the agent concerned in the particular transaction should not be inquired into as a question upon which its validity depends, for by this strictness the temptation to embark in what must always be a doubtful transaction is removed. If the defendant could have made out by the most conclusive evidence that \$90,000 in cash was a full. and more than a full, equivalent for the bargain which he got from the Japanese prince, it would be wholly irrelevant. At the same time we must add that the present case is one which comes very clearly within the mischief which the law is intended to obviate. Looking to the large price which the defendant stipulated to receive upon his sale of the Columbine, and the amount which was to be paid in cash, one cannot but feel some doubt whether his purchaser might not possibly, if the defendant's own interest had been out of the way, have been induced to give, instead of \$160,000, partly in cash and partly on credit, a sum down in cash exceeding, at least to a small amount, the limit of \$90,000 fixed by the plaintiff. But even if that were not so, it is, at all events, highly probable that if the offer of the Japanese prince had been submitted to the plaintiff he would have been willing to sell direct to him upon the terms of the contract made by the defendant with him. It is urged, no doubt, by the defendant that the terms were mixed up with the terms of the contemporaneous contract by which the defendant gave the prince further time for payment of debts then due, while hastening the period of payment for those coming due; but when those terms are looked at more closely it becomes apparent that, under any circumstances, the prince was prepared to give a large sum of money, with a considerable cash payment, for the plaintiff's vessel; and when it is asked, as it has been in argument, what was the defendant to do in the face of the alleged positive prohibition to sell for anything but cash, the answer is plain—he might have said, and ought to have said, "I cannot get all cash, but I can get so much cash and so much credit from a customer of mine, and if you do not like that, let me accept his offer for \*myself, and I will give you your limit [317] in cash." Full opportunity for taking this course, either through the post or by means of the telegraph, was open to

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the defendant; but, instead of taking it, he thought proper to conceal altogether from the plaintiff, from Gilman & Co., and even from his own manager at Nagasaki, the real nature of the transaction in which he was engaged; and, although he may have acted without any fraudulent or improper motive, he cannot reasonably be said to be free from blame, or to have a right to complain of consequences which a more due regard to his duty towards his principal could easily have obviated.

One matter alleged by the defendant, and actually supported by evidence, although in argument admitted to be untenable, ought not to pass without notice and reprobation, namely, an alleged custom or practice in the ports in which the defendant trades for an agent for sale with a minimum limit himself to take at that limit, and at his own option, the thing he is employed to sell. We cannot but express a hope that the court will never again hear of such a contention, or have before it such evidence. The fact that there has been a notion entertained by some commercial agents of the existence of such a custom or practice may go far to explain how such a transaction as that complained of in this suit came to be.

In conclusion, we are of opinion that, although some hardship may have been caused to the defendant by the delay of the plaintiff in taking these proceedings, he has, nevertheless, most properly been made liable in them; that the decree of the Vice-Chancellor should in all respects be affirmed, and the appeal be dismissed, with costs.

Solicitors for plaintiff: Tatham, Oblein & Nash. Solicitor for defendant: G. Badham.

[8 Chancery Division, 318.]

V.C.H., Jan. 15: C.A., March 18, 1878.

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[1877 T. 77.]

Voluntary Settlement—Agreement by Infant to settle—Ratification—Post-muptial Settlement in pursuance of Ante-nuptial Agreement by Infant—Statute of Frauds—Lord Tenterden's Act—Practice—Appeal—Rules of Court, 1875, Order LVIII, r. 15.

In 1857 an infant, engaged to be married, wrote to his intended wife, promising that on coming of age he would give her seven specified houses. The marriage took place in 1859, after he came of age. In 1872 he executed a deed, not referring to any previous agreement, by which he conveyed the above and two other houses to trustees upon trust for his wife for life, for her separate use, and after her death upon trust for himself for life, and after the death of the survivor, upon such trusts as the wife should by deed or will appoint, and in default of appointment, in trust for her

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in fee. He subsequently agreed to sell three of the houses, and the purchaser sued for specific performance

Held, by the Court of Appeal (reversing the decision of Hall, V.C.), that the purchaser was entitled to specific performance, for that as the settlement did not refer to any previous agreement, dealt with other property than that mentioned in the letter of 1857, and settled the property in a different way, there was no ratification in writing of the promise contained in that letter, and the settlement therefore was voluntary, and void as against a purchaser for value.

An order overruling a demurrer is not an interlocutory order within Rules of Court, 1875, Order Lvin, r. 15.

This was a purchaser's action for specific performance.

In June, 1876, the defendant Charles Shenton agreed to sell to the plaintiff three freehold houses, 713, 715, 717, Old Kent Road, Camberwell, and received a deposit. The de-Kent Road, Camberwell, and received a deposit. fendant refusing to complete, the plaintiff commenced this action against him. The defendant, by his defence, set up that the property had been settled under the circumstances and in manner following:

On the 10th of November, 1857, Shenton, who was then under age and engaged to be married, wrote to his intended

wife as follows:—

"Just a few lines to say that, as I shall come into my property when I become of age, and we are to be married shortly after, I will make you a present of a portion of the property, namely, the \*seven houses and shops ad- [319 joining the Turk's Head in Melbourne Place, Old Kent Road, which will bring you in £200 a year, and make you happy I will run over in the course of to-morrow and for life. talk the matter over with you."

The property mentioned in this letter included the houses which formed the subject of the action.

Shenton attained twenty-one before his marriage, which

took place on the 16th of June, 1859. By an indenture dated the 7th of June, 1872, made between Shenton of the first part, his wife of the second part, and Nethercroft and Smith of the third part, reciting that Shenton, having made no settlement in favor of his wife on the occasion of their marriage, was now desirous of making a provision for her by post-nuptial settlement, and that there was no issue of the marriage, and that Shenton was seised in fee of the messuages thereinafter described, with their gardens, &c., and was possessed of and entitled to the household furniture and effects thereinafter described, it was witnessed, that in consideration of the natural love and affection which Shenton bore towards his wife, as well as for divers other good and lawful considerations, Shenton granted to Nethercroft and Smith, and their heirs, nine houses in the Old

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Kent Road, to hold the same unto and to the use of Nethercroft and Smith, their heirs and assigns, in trust for Mrs. Shenton for life for her separate use, and after her death upon trust for Shenton for his life, and after the decease of the survivor upon such trusts as Mrs. Shenton should by deed or will appoint, and in default of appointment, in trust for Mrs. Shenton in fee. This deed contained no power of sale. William Easton was the representative of the surviving trustee of this deed, which included the seven houses mentioned in the letter of 1857.

The plaintiff demurred to the statement of defence. The demurrer came on to be heard before Vice-Chancellor Hall, and his Lordship directed it to stand over for the plaintiff to amend his statement of claim by adding Mrs. Shenton and Easton as parties. The defendants Shenton and his wife put in an amended statement of defence to the same effect as the original one, averring that the letter was written in pursuance of a parol promise made to the wife's father for 320] the settlement of the property; that the \*marriage took place on the understanding that the agreement should be confirmed by Shenton, and that the settlement, though not expressed to be made in pursuance of the agreement, was made by Shenton, and was understood by his wife and her father to have been made in satisfaction or confirmation of that agreement.

The plaintiff demurred to the amended statement of de-

fence.

The demurrer was heard before Vice-Chancellor Hall on

the 15th of January.

Hastings, Q.C., and Phear, for the plaintiff: There was no obligation upon the settlor either in law or equity to make this settlement, it was purely voluntary, and there is no trace upon it of any intention on the part of the settlor to confirm the invalid agreement entered into by him during his minority: Warden v. Jones ('); Doe v. Rowe ('); Honywood v. Honywood (').

Dickinson, Q.C., and P. B. Lambert, for the defendant

Shenton, were not called upon.

Dundas Gardiner, for Easton.

Lord Tenterden's Act was not pleaded nor mentioned in

argument.

HALL, V.C.: I am of opinion that this demurrer must be overruled. The question is not the subject of any express decision, and I must accordingly decide it upon principle.

<sup>(1) 23</sup> Beav., 487; 2 De G. & J., 276. (3) 20 Beav., 451.

The infant having previous to his marriage entered into a contract in writing, and having after his majority and after his marriage executed a settlement which gave, I think, substantial effect to that contract, I do not think that the settlement so executed was so devoid of consideration as to be within the statute 27 Eliz. c. 4. The contract entered into by the infant was for good consideration; it was not void at law: it was capable of being confirmed by him after he \*attained his majority, and he having, after com- [321 ing of age, deliberately settled the property in conformity with the contract, I will not be the first to hold that such a settlement can be defeated as being, under the statute of Elizabeth, void as against a subsequent purchaser for value. The limitations in the settlement give to the wife the ultimate fee, and, I think, are conformable to the contract. It might be a question whether, under the letter, she was entitled during her life to her separate use. I think she was: if not, the settlor has so interpreted the letter, and at all events, if she was not so entitled, the difference is unsubstantial for the present purpose, and would only make the settlement voluntary to a limited extent. I do not think it reasonable or sound to hold the settlement to be such an assurance as that act invalidates. It has recently been held by the Court of Appeal (*Price* v. *Jenkins* (')) that a settlement of leaseholds is not voluntary within that statute, and this because of the implied obligation to perform the covenants in the This decision shows that the operation of that statute is not to be extended.

The plaintiff appealed. The appeal was heard on the 13th of March.

Dickinson, Q.C., for the respondent, took the preliminary objection that the appeal ought to have been brought within twenty-one days: Rules of Court, 1875, Order LVIII, r. 15.

JESSEL, M.R.: An order overruling or allowing a demurrer is not an interlocutory order as respects the time for appealing.

COTTON and THESIGER, L.JJ., concurred.

Hastings, Q.C., and Phear, for the appellant: The observations of the Master of the Rolls in Honywood v. Honywood (') support the view that a settlement made after majority, in pursuance of a contract made during infancy, is voluntary.

[JESSEL, M.R.: You must not rely much on that case, as the order was reversed. The note at the end of the case

(1) 5 Ch. D., 619; 22 Eng. R., 857.

(9) 20 Beav., 451.

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322] is wrong in \*stating that it was heard before the full court. It was taken to the Lord Chancellor at the suggestion of the Lords Justices, and was heard by him in his private room; no formal judgment being given.]

Doe v. Rowe (') supports the same view. A mere recital of a contract made before marriage will not make a post-nuptial settlement one for value: Warden v. Jones ('). Then

a case of ratification is set up.

[JESSEL, M.R.: If an infant contracts in consideration of marriage, and formally ratifies the contract by writing after he comes of age, does not the contract become binding on

him ?]

Unless the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), applies, which it does not here, the contract does, no doubt, become binding on him; but we submit that his ratification cannot give an instrument a different effect as regards third parties. The settlement was voluntary, because there was no obligation to settle that could have been enforced. The letter, we submit, does not import a concluded agreement, and if it did, there is no confirmation in writing.

[JESSEL, M.R.: There is no act requiring confirmation to be in writing except Lord Tenterden's Act (9 Geo. 4, c. 14).

Does that apply to anything but actions at law?]

We submit that it is not confined to actions any more than the Statute of Frauds, which is similarly worded. The settlement does not refer to any agreement, and it is impossible to make out that there is any ratification in writing of the agreement; the settlement therefore was voluntary.

Dickinson, Q.C., and P. B. Lambert, for the respondents: The appellants ignore the difference between a written confirmation wanted to support an action, and an actual deed carrying into effect the agreement. The marriage is the consideration, and when the conveyance is made it is one for value. The case is quite different from one where it is sought to enforce the agreement.

323] \*[Jessel, M.R.: Do you say, then, that if there is a parol contract before marriage, and a conveyance after marriage in pursuance of it, the conveyance is for value?]

Yes.

[JESSEL, M.R.: Is not anything voluntary which a man cannot be compelled to do, and receives no consideration at the time for doing?]

Larender v. Blackstone (\*) supports the view that there is consideration enough to keep the settlement out of 27 Eliz.

(1) 4 Bing. N. C., 737.

(\*) 2 De G. & J., 76.

(\*) 2 Lev., 146.

The form of the letter is sufficient, Alt v. Alt ('); and c. 4. our contention that the settlement is not voluntary is supported by Countess Mountacue v. Maxwell (\*); Hodgson v. Hutchenson (\*); Taylor v. Beech (\*); Barkworth v. Young (\*); Randall v. Morgan (\*). As to the settlement including property not comprised in the agreement, that cannot impair its effect so far as regards the property which is in the agree-

JESSEL, M.R.: Assuming, in favor of the respondents, that the letter of the 10th of November, 1857, would in other respects have constituted a sufficient agreement, it appears that Shenton when it was written was an infant. He married after attaining twenty-one, and the settlement was not executed till 1872. It further appears that the agreement, if agreement it was, was to settle seven houses on the wife absolutely. The settlement comprised not only these houses, but other real estate, and did not give the property to the wife in fee, but gave it to her for her life for her separate use, with a life estate to the husband before the remainder in fee to the wife. The settlement, then, was made many years after the date of the agreement; it comprises other property; it limits uses different from those mentioned in the agreement; and lastly, it contains no reference, by recital or otherwise, to the agreement.

It was argued for the respondents, that there has been a ratification by the infant after coming of age, and that a contract for \*value made during minority acquires [324 validity by such a ratification. To this the appellant replies, that since the passing of Lord Tenderden's Act such a ratification must be in writing; that a ratification in writing must be shown here, and that if there is none the settlement is voluntary. The respondents, therefore, in order to succeed, must establish a ratification in writing and a conveyance made in pursuance of the agreement so ratified. not mean to say that the ratification and the conveyance must be by separate instruments, and cannot be comprised in the same deed. But I say that here there is no ratifi-The ratification may be by express refercation in writing. ence to the agreement or by implication, but a ratification must appear on the face of the writing. Here there is nothing on the face of the deed from which it can be inferred that there was any agreement, nor anything to show that the

deed was made in pursuance of the agreement. The onus,

<sup>(1) 4</sup> Giff., 84. (2) 1 Str., 286.

<sup>(\*) 5</sup> Vin. Abr., 522,

<sup>(4) 1</sup> Ves. Sen., 297. (5) 4 Drew., 1.

<sup>(6) 12</sup> Ves., 67.

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therefore, being on the defendants to prove a ratification, they have not proved it. Some observations were made during the argument as to the effect of a subsequent acknowledgment in writing of a contract, and Barkworth v. Young (i) was referred to in support of the contention that the settlement was for value, though there was no ratification till after the marriage. The answer to this is given by Warden v. Jones (1), which is subsequent in date to Barkworth v. Young, and therefore, so far as the two are inconsistent, overrules it. Lord Cranworth, there referring to a post-nuptial settlement reciting that it was made in pursuance of an ante-nuptial agreement, says (\*): "Lord Thurlow decided in *Dundas* v. *Dutens* (4) that such a settlement is good, and on that decision I will only remark, that if it be a correct view of the law, the whole policy of the statute is defeated. It cannot be enough merely to say in writing, that there was a previous parol agreement. It must be proved that there was such an agreement, and to let in such proof is precisely what the statute meant to forbid." that short passage the Lord Chancellor disposed of all the other authorities. We were pressed with an old case of Lavender v. Blackstone (\*), in which Lord Hale made a re-325] mark \*to the effect that a settlement was not fraudulent under the statute 27 Eliz. c. 4, if made in pursuance of articles entered into during the infancy of the settlor. The answer is, that dictum is not law; and in so saying, I am only expressing the result of all the recent authorities. In Doe v. Manning (') Lord Ellenborough reviewed the cases, and drew from them the conclusion that if a settlement was voluntary, it was fraudulent within the meaning of the statute. That decision was in 1807, and has been followed ever since, and to cite cases of earlier date with a view to lead the court to a contrary conclusion, is a mere waste of time. It is not for the court to go into antiquarian researches and discuss old dicta which have been completely disposed of by the current of modern decisions. tlement being voluntary is void against a purchaser, and I am therefore of opinion that the demurrer ought to have been allowed.

COTTON, L.J.: I also am of opinion that the demurrer is good. The only question to be decided is whether the settlement was for value or voluntary, and I need not enter upon the question decided in *Doe* v. *Manning*, to which the

<sup>(1) 4</sup> Drew., 1. (2) 2 De G. & J., 76.

<sup>(3) 2</sup> De G. & J., 85.

<sup>(4) 2</sup> Cox, 235.

<sup>(5) 2</sup> Lev., 146. (6) 9 East, 59.

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Master of the Rolls has referred; for it has long been settled law that every voluntary settlement of land is void as against a purchaser for value under the statute 27 Eliz. Here we have a letter which I will assume to be such as would have constituted a good contract if the writer had not been an infant. He, however, was an infant, and the agreement clearly could not be enforced against him unless he ratified it after coming of age. Now, by Lord Tenterden's Act (9 Geo. 4, c. 14), s. 5, it is enacted "that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." Is there in the present case any ratification in writing? A ratification in writing must either in terms or on the fair construction of the instrument refer to the contract which is to be ratified, and treat it as a subsisting \*contract. Here the settlement does not refer to any contract, it includes other property beside that mentioned in the letter, and therefore may as well refer to some other contract. We need not enter into the question whether, if there had been a distinct reference to the letter, that would have been enough to place matters on the same footing as if there had been a subsisting obligation to execute a settlement. Now here there certainly was not an enforceable contract at the time when the settlement was executed, unless the settlement itself ratified the contract so as to make it enforceable, and, looking at the frame of the settlement, I think it is impossible to make out a written expression of an intention to ratify the con-

It was urged that, though no action could be maintained for breach of the agreement, yet the settlement was not to be treated as voluntary. Warden v. Jones (') appears to me to decide the exact contrary of this contention. The consideration was held to be insufficient in that case, because the Statute of Frauds provided "that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, signed," &c. Here the question does not turn on the Statute of Frauds, but on Lord Tenterden's Act; but if in one case it is held that a parol contract before marriage cannot support a set-

tlement made after marriage, so here a settlement cannot be supported by an infant's contract of which there is no written confirmation.

It was objected that there could be no specific performance against a married woman; but none is asked against her. She is only brought here that her rights may be bound

by the question being decided in her presence.

THESIGER, L.J.: I agree that the appeal must be allowed. I cannot collect from the deed any intention to ratify the agreement. The deed does not refer to the agreement; four-teen years had elapsed since it was entered into. The property is not the same, and the limitations of the deed are 327] different from those provided for by the \*agreement. There is not, therefore, any ratification in writing within Lord Tenterden's Act, and the deed must be treated as voluntary.

Solicitors for plaintiffs: Russell, Son & Scott.

Solicitors for Shenton and wife: Lambert, Petch & Shak-spear.

Solicitors for Easton: Gowing & Mandale.

See 23 Eng. Rep., 670 note.

A husband may make a gift to his wife, or a settlement upon her, which equity will sustain as against creditors in the absence of a fraudulent intent.

in the absence of a fraudulent intent, and the question of such intent should be left to the determination of a jury: Conley v. Bentley, 87 Penn. St. R., 40.

Under the statute of Pennsylvania, it is not necessary that there should be a decree of any court that the wife is to be regarded as a feme sole trader, to entitle her to accumulate and hold property against her husband and his creditors; the right results from proof that she has been thrown upon her own resources for support, and that her husband has deserted her or neglected to provide for her from any cause: Conley v. Bentley. 87 Penn. St. R., 40.

ley v. Bentley, 87 Penn. St. R., 40.

A married woman, having at the time no separate estate, purchased a farm of a stranger entirely on credit, giving her notes for the price, secured by a mortgage upon the property. Her husband lived with her on the farm, and controlled the farm labor, carrying on the business in her name and as her agent, without any agreement as to his compensation for such services, and from the proceeds of the crops raised on the farm she paid one year's interest

on the purchase-money, and a certain amount of the principal. The purchase by her having been made in good faith, and not as a means of fraudulently placing the husband's property beyond the reach of his creditors: Held, that under the statutes of Wisconsin (ch. 44, Laws 1850; ch. 155, Laws 1872, R. S. §§ 2342-3), crops raised upon the farm by their joint labor and management belonged to the wife, and were not subject to sale for the husband's debt: Dayton v. Walsh, 47 Wisc., 113, following Feller v. Alden, 28 Wisc., 301, and distinguishing Lyon v. Railway Co., 42 Wisc., 548.

Co., 42 Wisc., 548.

Where an insolvent husband carries on business in his wife's name, claiming to be her agent at a salary, unless it is done in good faith, and with the separate means of the wife derived from some other source than the husband, the stock-in-trade and furniture are liable to be sold for his debts: Robinson v. Brems, 90 Ills., 351.

If a wife allows her husband to have and retain the possession of goods and stock-in-trade claimed by her as her separate property, and to transact business with it, such possession is prima facie evidence of ownership in him as to his creditors, and in a contest be-

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tween the wife and such creditor she must show, by a preponderance of evidence, that she is the owner of the property, or lawfully entitled to its possession: Robinson v. Brems, 90 Ills., **351**.

The creditor of an insolvent person can subject to the payment of his debt, real estate standing in the name of the wife, but toward the payment of which the debtor has contributed, to the extent of his contribution thereto; and this rule is not varied by the fact that the real estate in controversy embraces the homestead, which would, to the same extent, be liable for an antecedent debt: Croup v. Morton, 49 Iowa, 16.

If a married woman advances her own separate money, and places the same in the hands of her husband, for the purpose of carrying on any general trade, although in her name, and the husband, by his labor and skill in the undertaking, increases the funds, the entire capital embarked in the enterprise, together with the increase, will not constitute the separate estate of the wife, but will be liable for the debts of the husband: Robinson v. Brems. 90 Ills., 351.

If a collusive arrangement exists between a husband and wife, by which it is secretly understood between them that the name of the wife shall be used in the carrying on of business, and that the wife shall hold her husband's property and business, to hinder, delay or defraud his creditors, the transaction will be fraudulent as to such creditors:

Robinson v. Brems, 90 Ills., 351. One consideration alleged by defendants for the deed to the wife, was a loan by the wife to the husband of money several years before. Held, that if a wife allows her husband to use her capital as his own, invest it in his own name, and thereby obtain credit on the faith of his being the owner of the property, she will not be allowed to interpose her claim to the property so acquired, to the injury of his creditors, and that the consideration so alleged was not sufficient in law: Miller v. Payne, 4 Bradw. (Ills.), 112.

As to how far creditors of a husband may reach his labor expended in improving his wife's real estate, see Croup v. Morton, 49 Iowa, 18.

Where the earnings of the wife were 25 Eng. Rep.

undoubtedly received by the husband, with her full knowledge and consent, and his use thereof was with her entire acquiescence, the presumption would naturally arise that the wife intended the moneys thus received as a gift to her husband, and particularly in the case where they were used for their common benefit: Matter of Cogley's Estate, 37 Leg. Int., 62; Ruder v. Flinn, 6 South Car. Rep., 216.

An honest, bona fide, and fair agreement made by a husband to pay his wife for releasing her inchoate right of dower is valid. If a third person defraud her in exchanging lands therefor he is liable to her: Bissell v. Taylor, 41 Mich., 702; Bailey v. Litten, 52 Ala., 282; Payne v. Hutcheson, 32 Gratt., 812.

Where a wife's inchoate right of dower was worth \$390.92, the entire property selling for \$2,500, and her husband, to induce her to relinquish it, gave her his note for \$3,500, on which \$1,400 had been paid: Held, that the note was only valid to the amount of the value of her inchoate right of dower, and that as the payments made exceeded that, the action could not be maintained: Kelly v. Case, 18 Hun,

The defendants also alleged as consideration for the deed, the release by the wife of dower rights on other lands, but the court are of opinion, from an examination of the record, that such release of dower did not in fact enter into the consideration for the deed, but was interposed as an afterthought to strengthen the plea of defendants: Miller v. Payne, 4 Bradw. (Ills.), 113.

The conveyance, by a man to a woman, of his property in consideration of her marrying him, with her knowledge that the property remaining in his hands is not sufficient to satisfy the claims of his creditors, is void as against them. It is not a sufficient consideration to sustain such a conveyance against creditors, that she gave up a profitable business to marry grantor. Such a conveyance made before marriage, upon a mere oral promise to marry, is void under the statute.

If made for the taking care of the grantor by the grantee, it is void as against creditors as creating a trust for his own benefit: Keef v. Keef, 7 Abb.

N. C., 240.

Ex parte Joselyne. In re Watt. Bath's Case. C.A.

The owner of land, subject to a mortgage created by himself and his wife, being in insolvent circumstances, sold the equity of redemption therein to a bona fide purchaser, the wife joining in the conveyance, and the larger portion of the consideration being paid her in the shape of a promissory note, which she subsequently paid over to one J. N., upon a purchase from him of his equity of redemption in other lands; the conveyance of which was made to the wife. On a bill filed by an execution creditor of the husband impeaching the transaction as fraudulent, under the statute of Elizabeth, held, that it was a fraudulent device to defeat creditors, and that the plaintiff was entitled to follow the consideration paid to J. N. into the lands conveyed by him to the wife: Fleury v. Pringle, 26 Grant's (U.C.) Chy., 67.

[8 Chancery Division, 327.] C.A., March 14, 1878.

Ex parte Joselyne. In re WATT.

Secured Creditor-Garnishee Order Nisi-Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), as. 12, 16, subs. 4.

A judgment creditor, who, before the filing of a liquidation petition by his debtor, has obtained a garnishee order nisi attaching debts due to the debtor, is a secured creditor within the meaning of sects. 12 and 16 of the Bankruptcy Act, 1869, and is, therefore, entitled to the attached debts as against the trustee in the liquidation, even though they did not become actually payable until after the commencement of the liquidation

Emanuel v. Bridger (1) and Lowe v. Blakemore (2) followed.

Ex parte Greenway (8) disapproved.

(\*) Law Rep., 10 Q. B., 485; 14 Eng. R., 291. (1) Law Rep., 9 Q. B., 286. (\*) Law Řep., 16 Eq., 619.

> [8 Chancery Division, 884.] C.A., Feb. 13, 27; March 20, 1878.

## 3341 \*In re Norwich Provident Insurance Society. BATH'S CASE.

Company-Power to compromise-Cancellation of Shares-Past Members.

A company was established for effecting life insurances and insurances against such other kinds of risk as might thereafter be determined upon by general meeting. In March, 1872, a general meeting resolved that fire insurance and fidelity guarantees should be added to their business. New shares, called B shares, were issued to provide for this new branch of business, which was to form a separate department. The company were shortly afterwards advised that this proceeding was ultra vires and the B shares invalid; and one of the B shareholders obtained from the Court of Chancery an order removing his name from the register on that ground. An arrangement was accordingly made for starting a new company to take up the fire and fidelity guarantee business. The assets of the fire and fidelity department were to be handed over to the new company, which was to undertake the fulfilment of the contracts of that department. The new company was to issue to the B shareholders shares credited with the amounts paid by them respectively on their B shares, and the B shares were to be cancelled. The appellant, who was a B shareholder, had shares allotted to him accordingly in the new company, and, on the 24th of September, 1873, his B shares were cancelled. On the 25th of April, 1874, a resolution was passed to wind

CA · Bath's Case. 1878

up the old company. The appellant having been placed on the list of contributories, applied to have his name removed, which was refused by Bacon, V.C.;

Held, by the Court of Appeal, that the issue of B shares was not ultra vires, and

that the B shareholders effectually became shareholders in the company:

But held, that a corporation or company has, as an incident to its existence, the same power of compromising claims made against it as an individual has, and that the cancellation of B shares being made as part of a bona fide arrangement for compromising a dispute whether those shares had been \*legally issued, was [335] valid; and that the appellant, from the time of the resolution for cancellation of his shares, ceased to be a member of the company:

But held, that, as the appellant had legally been a shareholder, the cancellation could not affect any rights previously acquired by creditors; and that he must be on

the list of contributories as a past member.

THE Norwich Provident Insurance Society, Limited, was established under a deed of settlement dated the 20th of November, 1860, with a nominal capital of £50,000 in 5,000 shares of £10 each. The 3d clause gave a very lengthy statement of its objects, which shortly were to effect insurances against or upon the contingency of sickness, ill-health, advanced age, or other personal infirmity, disability, incapacity, or injury; insurances on any contingencies connected with sickness or health; insurances on lives or survivorship, or on any contingencies connected with lives or survivorship; to grant, purchase, and sell endowments by way of "and generally to make and effect insurances annuity; against all and every kind of risk, special or general, which may be effected according to law, and which may at any time hereafter be determined upon by a general meeting in pursuance of the power contained in the fourth paragraph of clause 13 of these presents, and upon such terms and conditions as may seem reasonable and expedient, having due regard to the business of an insurance society."

The 13th clause gave powers to a special general meeting,

by such majority as therein mentioned,—

"(1.) To increase at any one time, or from time to time, the nominal amount of the capital of the Society, and for that purpose to create a sufficient number of new or additional shares of such nominal value or values per share, and either wholly or partly with or without special privileges or preferences over the original shares, or any of them, as to the meeting may seem fit; . . . . provided that such addition or additions to the capital of the Society do not exceed in the whole, including the original capital of £50,000, the sum of £200,000; and provided also, that every such increase in the nominal capital of the Society be carried into effect by a supplemental deed of settlement, which shall be executed by the then chairman or any two of the then directors of the Society for and on behalf of the Society, and on being so \*executed shall be and become as binding on [336]

all the shareholders as if every shareholder had been a party to and executed the same.

"(4.) To amend, add to, or repeal all or any of the clauses or provisions of the deed of settlement of the Society which may be in force for the time being, including all or any of the provisions of this present clause, and in so doing to increase or diminish the amount or vary the distribution of the capital, and to alter the nominal value or number respectively of the shares, or any of them, in which the same may be held, and also, subject to the 3d clause of these presents, to alter the objects, business, and constitution of the Society, or any or either of them, as may be thought proper: Provided that no alterations be made in the name or in the 3d clause of these presents defining the objects of the Society, and that no alteration be made in the provisions of the deed of settlement, or any of them, which is inconsistent with this proviso and with the 3d clause of these presents."

On the passing of the Companies Act, 1862, this company

was registered under it.

On the 31st of March, 1872, a special general meeting passed a resolution that the directors should be "empowered to enter into, effect, and carry on the business of insurance against risks by fire, and also the business of guaranteeing the fidelity of clerks, servants, and others, and to make such regulations for the same, to appoint such officers, or to vary the appointment of existing officers, to enter into such contracts and to take such steps as they in their discretion may think proper."

A special issue of B shares of £1 each was made to provide for this new branch of business, which was to form a separate department; and the policies insuring against such risks contained a clause confining the remedy of the policy holders to the unpaid portions of the B shares and the funds appropriated to this department. The appellant took 2,000 of these shares, which were allotted to him in July, 1873,

and he paid 5s. per share, amounting to £500.

Shortly afterwards doubts arose as to the validity of these proceedings, and the Society took the opinion of Mr. Wordsworth, Q.C., Mr. Napier Higgins, Q.C., and Mr. Cozens-Hardy, who advised that the Society was not empowered, 337] by any words in the deed of settlement, \*to undertake any other than life business, and that the issue of the B shares was ultra vires. After this one of the B shareholders obtained an order from the Court of Chancery for the removal of his name from the list of shareholders, and for the return of the money he had paid on his shares, on the

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ground that the issue of them was ultra vires. The facts mentioned in this paragraph were shortly stated in an affidavit by the liquidator without any further particulars than are here given, and there was no further information before

the court on the subject.

The Society thereupon resolved to get up another company for the purpose of taking over the fire insurance department of their business. A company was accordingly registered in September, 1873, under the style of The Norwich Provident Fire Insurance Society, Limited, which name was afterwards changed to The Provident Fire Insurance Company, Limited, and it will be referred to as the Fire Company. Along with its memorandum and articles was registered an agreement between the Society and the Fire Company whereby it was provided, 1, that the Society should hand over to the Fire Company all effects belonging to the fire department; 2, that the Society when called upon should assign to the Fire Company the benefit of all agreements relating to the fire department; 3, that the Fire Company should take over all policies against fire and guarantees for fidelity which had been issued by the Society, and indemnify the Society against them; 4, "The Fire Company to forthwith issue to the said Society or its nominees 30,589 shares of £1 each in the said Fire Company, credited with the respective sums paid by the various holders of the said B shares in the said Society in substitution for such B shares, and not in any case by way of additional profit or bonus, it being the intention of the said parties hereto that the respective holders of B shares in the said Society shall henceforth be and become holders of shares in the said Fire Company and be credited with the several amounts paid by them in the said Society, and which said last mentioned shares the the said Society hereby undertakes to cancel in due form forthwith."

The appellant on the faith of this applied for 2,000 shares in the Fire Company, and on the 24th of September, 1873, they were allotted to him, and he was credited in respect of them with \*the £500 which he had paid on his B The great mass of the B shareholders similarly took shares in the Fire Company in substitution for their original B shares.

On the same 24th of September, 1873, the directors of the Society at a board meeting passed a resolution cancelling a mass of B shares, the holders of which had thus taken shares in the Fire Company. Among the shareholders included in this resolution the appellant was mentioned by name.

Some time after this the Fire Company brought an action for calls against the appellant, who insisted on a right to repudiate the shares on the ground that he had been induced to take his B shares in the Society by misrepresentation. The action was compromised on the terms of the appellant paying £500, and the shares being forfeited. The directors of the company accordingly declared the shares forfeited, and removed the appellant's name from the list of shareholders on the 12th of February, 1875. The Fire Company was ordered to be wound up on the 15th of January, 1876, and the appellant successfully resisted an attempt to place him on the list of contributories.

At an extraordinary meeting of the Society, held on the 25th of April, 1874, a resolution was passed for a voluntary winding up of the Society, and was confirmed on the 30th of May. On the 1st of July, 1874, an order was made for con-

tinuing the winding-up under supervision.

Messrs. Butterworth in March, 1873, had insured with the Society buildings which were burnt down in the following May, and in 1877 a balance of £225 remained due to them. On the 9th of March, 1877, they obtained an order for serving on the B shareholders, who had taken shares in the Fire Company, notice to show cause why they should not be settled on the list of contributories of the Society. Bath attended and objected to being placed on the list, and his objection was allowed by the liquidator.

On the 2d of August, 1877, Vice-Chancellor Bacon, on an application made against Alexander and Cooke, two of the persons in the above position, held that they were liable to be placed on the list, and directed that the list should be

settled on that footing.

Bath was then placed on the list, and applied to Vice-339] Chancellor \*Bacon to have his name removed. The application was heard in chambers and refused, without argument, as being covered by the decision in the previous case.

Robinson, Q.C., and Brice, for the appellant: We contend that the creation of the B shares was ultra vires, the company having no power to undertake fire insurance. If so, Bath never became a shareholder at all. The cancellation, therefore, was proper and effectual: Hartley's Case ('); Barnett's Case ('); Stace and Worth's Case ('). The general words of clause 3 are cut down by the context, and by

<sup>(1)</sup> Law Rep., 10 Ch., 157; 11 Eng. R., (2) Law Rep., 18 Eq., 507; 10 Eng. R., 511. (3) Law Rep., 4 Ch., 682.

clause 13, sub-sect. 4, fire insurance cannot therefore be brought within the objects of the company: Ashbury Railway Company v. Riche ('); Ex parte Bagshaw ('). But, supposing that Bath became a shareholder, we contend that he was released by a bona fide compromise. A shareholder had obtained a decision from the court that he was entitled to be relieved from his shares, and we contend that the directors were right in acting on that decision: Barnett's Case. In Dixon v. Evans (') shareholders were let off on the ground of a compromise; so in Lord Belhaven's Case ('); Wright's Case (').

[JESSEL, M.R.: Have you any case in which this has been held, where the directors had no express power to com-

promise ?]

The point does not appear to have been decided, but we submit that a corporate body must have the same power of entering into bona fide compromises as an individual. Here three counsel had advised that the issue of B shares was ultra vires, and the court had decided so, and whether the opinions and decisions were right or wrong there was evidently a real dispute on which a compromise could be based. The shareholder should be released from liability ab initio: Wright's Case; Barnett's Case.

Hemming, Q.C., and T. Brett, for the liquidator: If Bath was ever a shareholder at all, he must be on the list as a past member, and that will be enough for the liquidator.

\*[They were then stopped by the court.] [340 JESSEL, M.R.: In this case questions are raised of very considerable importance, upon which I intend to say a few words.

In the first place, has a corporation or quasi corporation under the general law the same right to compromise claims brought against it as individual persons have? I cannot bring my mind to doubt the soundness of the affirmative of that proposition. I can see no reason why the general law should put a limit on the authority of corporations who are artificial persons, if I may say so, that it has not put on the authority of natural persons. It seems to me that principle—and authority, so far as it goes, that is the dictum of Lord Westbury in Dixon's Case (')—point to one conclusion, that corporations must have such power as an incident to their existence. It would be a startling proposition that,

<sup>(1)</sup> Law Rep., 7 H. L., 658; 14 Eng. (4) 3 D. J. & S., 41. R., 42. (5) Law Rep., 4 Eq., 341. (8) Law Rep., 7 Ch., 55; Ibid, 12 Eq., 385 n.

<sup>(3)</sup> Law Rep., 5 H. L., 606. (4) Law Rep., 5 H. L., 618.

whereas an individual may always avoid having resort to litigation by compromising a claim against him, a corporation can never avoid it, but must either fight out the claim or make arrangements sanctioned by the order of a court of justice; yet such would be the result of holding that a corporation has no such general power. In the next place, if it were necessary to consider whether sufficient power to compromise was expressly given by the deed of settlement, I should be prepared to decide in the affirmative, but I do not wish to rest my decision upon any such ground.

That being so, the next point we have to consider is whether the compromise, or arrangement by way of compromise, which was come to was made bona fide. Upon that I have no doubt whatever. Whether or not the reasons given for that arrangement are satisfactory, I must consider for another purpose, but whatever the reasons were, I am satisfied that the compromise was not colorable, was not intended to cover another purpose not disclosed on the face of it, but was a bona fide arrangement made to carry out the original intention of the parties in another way, when they found out, or believed they had found out, that they could not be carried out in the mode originally suggested.

Now, I come to the next question, Was there in fact any \*objection to what had been done?—that is, was the original arrangement ultra vires. In my opinion it was First of all, as a question of construction of the deed of settlement, I have no doubt that the business both of fire insurance and of what they call fidelity guarantee, which is a kind of insurance against fraud by persons employed by others in situations of trust, relate to kinds of risks which can be validly insured against by the law of England, and come within the express terms of the 3d clause. I cannot see that there is any ground for restricting the meaning of the terms of the latter part of that clause, or for applying that which is so often called the doctrine of noscitur a sociis, when you cannot suggest a single instance of a risk having any connection with life insurance which is not included in the express terms of the prior part of the clause. It seems to me that the only fair mode of reading the latter part of the 3d clause, is to read it in its natural and unrestrained sense.

That being so, it appears to me that the arrangement proposed was valid, that the issue of the B. shares in the existing company for the purpose of enabling the company to carry on the business of fire insurance and fidelity guarantee insurance was a valid issue, and that the capital raised or pro-

posed to be raised could have been validly and properly devoted to the purpose for which it was intended to be raised. and indeed that the whole arrangement was valid from its inception to its end. The result of that, therefore, would be that Mr. Bath, the present appellant, effectually became a shareholder of the B shares of the original company which were issued to him. But the company was afterwards advised that the issue of the shares was ultra vires and invalid. and that the arrangement could not be carried out, and both Mr. Bath and the other B shareholders and the company accepted or adopted the view of their legal advisers. Both parties believing, therefore, that the shareholders were not legally shareholders, agreed to carry out the contemplated arrangement in another way, by starting a new company to carry on the business of fire and guarantee insurance, and to transfer, if I may so say, the shares and deposits of the B shareholders to the new company. The mode which they adopted was to agree that the B shares in the old company should be cancelled, that the B shareholders should become \*shareholders to the same amount in the new company, that the deposits which had been paid should be transferred to the new company, that the new company should take over the fire and fidelity business, which for some months had been carried on by the old company, and should indemnify the old company from all liabilities in respect of that business, of course receiving all payments which had been made to the old company in respect of the business so transferred.

Now what was the legal effect of that arrangement? am right in what I have said, that the arrangement being made bona fide, and being an arrangement for compromise of a question as to whether or not the shares were legally issued, was a valid arrangement, what effect would it have upon the company? Surely it would be valid as between the shareholders represented on the one side by their directors, or rather by the corporate body, which the directors had the power to bind, and the new shareholders, who agreed to cancel their shares and to become from that date shareholders in the new company; but it does not appear to me that that could affect those who had claims against the partnership or quasi partnership which had been validly formed, and which had been carried on for some months. The directors could do no more than bind their corporate body as regards the compromise. They could not take away any rights which creditors had acquired. The original issue of B shares being valid, it seems to me that although the B 25 Eng. Rep.

shareholders would from the time of the cancellation cease to be members of the company, they would not be relieved from the consequences of having been members up to the time when the arrangement took place. In this respect the case appears to me to be different from the cases which have been cited. Those were cases in which the original contract was either void or voidable. If it was void, the creditors would have no claim whatever on the alleged contributories, inasmuch as they never had been partners at all. If it was voidable by reason of having its inception in fraud, and notice was given in due time of an intention to avoid it or to refuse to be bound by it, then the contract would be avoided ab initio, and no creditor could have the benefit of it as against the different parties who avoided it in due time before the winding-up. It appears to me, therefore, that we \*are not bound by those decisions to hold that the company have any power whatever to destroy by the compromise liabilities which had arisen under a valid contract by which a person now alleged to be a contributory had actually become a shareholder in the company before the time of the arrangement.

It appears to me, therefore, that the order of the Vice-Chancellor, which is not to go further, nor is intended to go further, than making the appellant a contributory as a past

member, must be affirmed.

JAMES, L.J.: I am of the same opinion; and I do not think it necessary to add anything, except to say that, independently of the power in the deed of settlement, I think we are warranted in holding that a power bona fide to compromise any dispute whatever is incident to the legal existence of the persona of a body corporate or politic, or of associations which are quasi corporate.

BAGGALLAY, L.J.: I have nothing to add. I have ar-

rived at the same conclusion.

March 20. The case was mentioned again on the minutes; the question being whether the order on appeal, after affirming the decision of the court below, should go on to say, "But it is at the same time ordered that the said appellant, E. A. Bath, be included in the list of contributories of the company as a past member only of the said company, his membership having ceased on the 24th day of September, 1873." These words were objected to by the liquidator.

Brett, for the liquidator: I contend that the effect of the decision of the Court of Appeal was to impose on Mr. Bath a present liability for debts incurred before the time when

he ceased to be a shareholder, but not to make him a B shareholder within the meaning of the Companies Act, 1862, s. 38. There is not here, as in the ordinary case of a past member, a transferee who undertakes to stand in the shoes of \*the original shareholder. The liquidator, there- [344 fore, objects to the expression that the appellant is only to be included as a past member.

Brice, for the appellant: A man may be on the list as a past member although there is no transferee to represent him: Creyke's Case (1). The liquidator wants to make out that there are three classes—present members, past members, and present members whose liability terminated on a past day. There cannot be any such threefold division. A man

if he has ever been a member at all, must either be a present

member or a past member.

JESSEL, M.R.: Our decision went upon this: that the appellant was under no liability to the company, as he had ceased to be a member, but that as regarded creditors his liability for debts contracted before he ceased to be a member continued. It is immaterial to the creditors whether he is primarily or secondarily liable, and as between himself and the persons who were shareholders in the company at the time of the winding-up, he is not liable. I am of opinion, therefore, that the words objected to ought to form part of the order.

COTTON, L.J.: I did not hear the appeal argued, but it appears to me that the continuing members got the benefit of the cancellation of the appellant's shares, and that as between him and them he is not liable at all. This, however, having taken place within the year, does not displace his liability to creditors for debts incurred while he was a shareholder, and to them he must be liable, but only if the continuing shareholders cannot pay.

THESIGER, L.J., concurred.

Solicitors: Valpy, Chaplin & Peckham; Tillyard.

(1) Law Rep., 5 Ch., 68.

An honest settlement, made in good faith, by a corporation with one of its stockholders, whereby doubtful stock of the then stockholder is extinguished, is binding upon the creditors of the corporation: Hyde v. Lynde, 4 N. Y., 387; Emmot v. Reed, 4 Sandf., 229, 8 N. Y., 312; Bank v. Demmon, Lalor's Sup., 398.

But the illegal surrender of stock and release of a stockholder by the corporation, without such an honest bona fide settlement, is invalid as against its creditors: Nathan v. Whitlock, 9 Paige, 152, affirming 3 Edw. Chy., 215; Tuckerman v. Nathan R. Brown, 11 Abb. Prac., 389, 33 N. Y., 297; Osgood v. Loyten, 3 Keyes, 521, 3 Abb. Ct. App. Dec., 418, 37 How., 63; Tuckerman v. Morgan L. Brown, 23 How. Pr., 109; Houghton v. McAuliff, 26 How, Pr., 271, 2 Abb. Ct. App. Dec., 409; Ogelvie v. Knox, etc., 22 How. U. S., 380; Brown v. Appleby, 1 Sandf., 158,

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affirmed by Court Appeals, 4 Sandf. Chy., 581 note; Sands v. Hill, 42 Barb., 651; Gillett v. Moody, 3 N. Y., 479; Palmer v. Lawrence, 3 Sandf., 161; Van Cott v. Van Brunt, 2 Abb. N. C., 283; Collins v. Swan, 7 Rob., 623; Pettibone v. Hawkins, 2 N. Y. Leg. Obs., 210; Johnson v. Bush, 3 Barb. Chy., 207, 240; Mann v. Pentz, 2 Sandf. Chy., 257; reversed on another point, 3 N. Y., 415; Stanhope's Case, L. R., 1 Chy., 161; Payson v. Withers, 5 Bissell, 269; National, etc., v. Yeomans, 8 R. I., 25; Ryanhard v. Hovey, 13 Ohio, 300; Cass v. Pittsburg, etc., 80 Penn. St., 31.

See Palmer v. Lawrence, 5 N. Y., 389; Pentz v. Hawley, 1 Barb. Chy., 122; Briggs v. Penniman, 8 Cowen, 387; Austin v. Daniels, 4 Denio, 299; Tallmadge v. Fishkill, etc., 4 Barb., 382; Cowles v. Gridley, 24 Barb., 301; Lyman v. Bonney, 118 Mass., 222.

[8 Chancery Division, 345.]

M.R., Nov. 20, 1877. C.A., March 26, 1878.

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\*DEAN V. MACDOWELL.

[1875 D. 6.]

## DEAN V. MACDOWELL.

[1876 D. 56.]

Partnership—Covenant not to engage in any Business except upon the Account and for the Benefit of the Partnership—Remedy for Breach of Covenant—Action for Account of Profits and claiming other Business as Assets of the Partnership.

The plaintiffs and defendant, being partners as salt merchants and brokers, mutually covenanted by the partnership articles to diligently employ themselves in the partnership business, and "not to engage, directly or indirectly, in any business

except upon the account and for the benefit of the partnership."

After the expiration of the partnership by effluxion of time, the plaintiffs discovered that during the partnership the defendant had been engaged in another

business as a salt manufacturer in which he had made profits.

A bill filed by the plaintiffs to compel the defendant to account to the partnership for such profits was dismissed without costs; and an action by the plaintiffs claiming that the defendant's interest in the other business formed part of the partnership assets was dismissed with costs.

The decision of the Master of the Rolls affirmed.

By articles of partnership dated the 28th of August, 1866, the plaintiffs, Robert Dean and Robert Rayner Dean, and the defendant, Charles Andrew MacDowell, agreed to carry on the business of salt merchants and salt brokers at Liverpool as partners for the term of seven years from the 1st of March, 1866, under the firm of Dean Brothers.

By clause 8 the partners mutually covenanted to "diligently and faithfully employ themselves in and about the business of the partnership, and carry on and conduct the same to the greatest advantage of the partnership." •

Clause 11 was as follows:-

"Neither of them the said Charles Andrew MacDowell and Robert Rayner Dean shall, either alone or with any other person, either directly or indirectly, engage in any

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trade or business except upon the account and for the benefit of the partnership, but the said \*Robert [346 Dean may engage in any other trade or business if he shall think fit."

The partnership was carried on by the plaintiffs and defendant until the 1st of March, 1873, when it expired by

effluxion of time.

Shortly afterwards the plaintiffs discovered that the defendant had, during the last two years of the partnership, been engaged actually, though not ostensibly, as partner in a firm of Ashton & Sons, who were carrying on the business of salt manufacturers; the name of the defendant's son, a youth without capital, having been used in the business as the nominee and representative of the defendant, who himself contributed the necessary capital. This partnership expired by effluxion of time on the 31st of March, 1873, and then the defendant, being free from the partnership with the plaintiff, entered in his own name into the firm of Ashton & Sons.

By the time the partnership of Dean Brothers had expired, the firm of Ashton & Sons had made considerable profits, for which the plaintiffs, relying on the 11th clause of their partnership articles, required the defendant to account, which he declined to do. Accordingly, in January, 1875, the plaintiffs filed a bill to have it declared that the defendant was bound to account to the firm of Dean Brothers for his share of the profits realized by the firm of Ashton & Sons between the date of his becoming a partner in that firm and the 1st of March, 1873, the date on which his partnership with the plaintiffs expired; for an account of the defendant's share of the profits made by Ashton & Sons between those dates; and for consequential relief.

Subsequently, in February, 1876, the plaintiffs brought a second or supplemental action against the defendant, insisting that their right in respect of his interest in the firm of Ashton & Sons was not confined to his share of the profits as above mentioned, but extended to the whole of his interest; and they accordingly claimed a declaration that his interest in that firm both before and after the 31st of March, 1873, belonged to and formed part of the assets of Dean

Brothers.

The defendant, in his answer and statement of defence to the two actions, admitted that the business of Ashton & Sons had been carried on for his benefit, but asserted that he had never \*interfered in its conduct during the partner- [347]

ship of Dean Brothers, and that what he had done tended in reality to benefit and not to injure the partnership.

The plaintiffs then joined issue, and the two actions now

came on for trial.

It appeared from the evidence that there was no rivalry between the two firms of Dean Brothers and Ashton & Sons during the existence of the first-named firm, who were in fact employed by Ashton & Sons as their brokers for the sale of the salt which they manufactured; but after the dissolution of the firm of Dean Brothers, Ashton & Sons ceased to employ the plaintiffs as their brokers.

The cause and action came on for hearing before the Master

of the Rolls on the 2d of November, 1877.

Southgate, Q.C., Chitty, Q.C., and Rotch, for the plaintiffs: We rely on the special contract created by the 11th clause of our articles of partnership, under which the defendant, if he engaged in any other business, was bound to account for it to the partnership. The clause says that the other business, if engaged in, shall be "on account" and for the "benefit" of the partnership, which must include the right to an account of the profits made in that other business. The partnership having expired, no injunction could reach the defendant. The clause means that he shall not engage in another business except upon the terms of his accounting for it to the partnership, and to evade that clause he engaged in the business of Ashton & Sons in his son's name instead of his own, thus fraudulently concealing from us his real position.

JESSEL, M.R.: I only wish to hear you, Mr. Roxburgh, on the question of the costs of the first action. The defendant has clearly committed a breach of the articles. As to

the second action, there is no ground for it.

Roxburgh, Q.C., Davey, Q.C., and C. Parke, for the defendant: Though the defendant may have committed a breach, no case of fraud is made against him by the bill, and he has therefore been improperly charged with it at the bar.

348] \*Jessel, M.R.: In my opinion there is no equity whatever in this bill. As I have often said, upon questions of construction—if there is a question of construction in this case—I am never apt to be very positive as to the correctness of my opinion, but I must say that to my mind there is no question whatever here as to the meaning of clause 11 of the articles. It is a clause as familiar to me as any clause that ever was penned. It is the correlative of clause 8.

Clause 8 means this, that the partner shall devote himself

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diligently to the business, and clause 11 means that he shall not engage in any other business except on account and for the benefit of the partnership. But there is no covenant that if he does he will account for the profits to the partner-

ship, which is what this bill asks for.

It is a simple breach of covenant by engaging in business indirectly. It does not appear to me at present that he has damaged the partnership at all, but this is not a bill for damages; it is a bill to take an account of the share of the profits made by him in another business in which he engaged by the agency or the intermediacy of a trustee. He was indirectly engaged because he furnished the capital and took the profits. It is not even alleged that he neglected the partnership business or that the partnership sustained

any damage whatever.

That being so, it appears to me that such an article is to be enforced, and has been in other cases enforced, when a breach of it has been discovered, either by injunction to restrain the partner committing the breach from engaging in the other business, or by a dissolution. The mischiefs of his engaging in another business are two. It may be that it diverts his mind from the partnership business, and takes away his time and attention, which did not happen in this case; or it may be that it makes him liable for the losses of the other business, and so may involve him and damage the partnership in which he is engaged, and therefore the other partners have an option of intervening by injunction, and that has been the remedy usually adopted; or they may, at their election, dissolve the partnership for breach of the articles.

Those are the two remedies. But ever since the Court of \*Chancery existed no one has ever heard of such a [349 bill as this, frequent as the breach, I am afraid, has been. That is pretty good proof that there is no such equity.

But in addition to that I go upon the plain words of the article. It is a mere negative covenant, and is not an affirmative covenant at all. It does not entitle the plaintiffs as partners in the business of Dean Brothers to take the defendant's share of the other partnership business, or to intervene in it in any way whatever, as far as I understand that covenant. Therefore, there being no superadded equity, it seems to me that the bill wholly fails, and ought to be dismissed.

As regards the costs, in my opinion what the defendant did was a breach. It may not have done any harm to the partnership, or it may: I do not see any claim for damages.

At the same time a man who enters into engagements of this kind should observe them, and when a bill is brought against him, and more especially when he has not demurred or put in an answer attempting satisfactorily to defend his conduct, I think I must say that he is so blamable for what he did that it warrants me in dismissing the bill without costs.

As to the claim in the second action, in my opinion that is simply extravagant and should be dismissed with costs. The result therefore is, that the bill in the first suit will be dismissed without costs, and in the second action there

From this decision the plaintiffs appealed. The appeal was heard on the 26th of March, 1878.

will be judgment for the defendant, with costs.

Southgate, Q.C., and Chitty, Q.C. (Gazdar with them), for the appellants: Upon the construction of the 11th clause of the articles, we contend that if a partner entered into another business in breach of the articles, the profits were to be held "upon the account and for the benefit of the partner-But, independently of those words, the plaintiffs have an equity to claim all profits made by the defendant in breach of his engagement with them. His breach of the articles was something more than a breach of covenant between \*strangers—it was a breach of the fiduciary relation which exists between partners. If the defendant had chosen, he might have damaged the firm of Dean Brothers greatly by using his influence in the other partnership to establish a rivalry between the two firms, and induce Ashton & Sons to cease to employ Dean Brothers as their brokers. defence that he did not in fact do so; he placed himself in a false position by entering into a relation inconsistent with his duty to the plaintiffs. The fact that he kept the step which he had taken secret from the plaintiffs, shows that he was conscious that he was committing a breach of his duty towards them.

The principle for which we contend is admitted in Somerville v. Mackay ('), although the decision was merely as to a right to discovery, and that case has been cited in support of the principle in various text writers and subsequent cases. Story's Equity Jurisprudence (\*); Collyer on Partnership (\*); Bisset on Partnership (\*); Lindley on Partnership (\*); Lock v. Lynam (\*); Russell v. Austwick ('); Glass-

<sup>(1) 16</sup> Ves., 382.

<sup>(5) 3</sup>d ed., pp. 595, 606, 609. (6) 4 Ir. Ch. Rep., 188.

<sup>(2)</sup> Par., 669. (<sup>3</sup>) 2d ed., p. 165.

<sup>(1) 1</sup> Sim., 52.

<sup>(4)</sup> Page 134.

ington v. Thwaites ('). On the same principle we are entitled to share in the value of the defendant's interest in the new partnership as claimed in the action, for it was obtained through the medium of his connection with Dean Brothers.

Roxburgh, Q.C., Davey, Q.C., and C. Parke, for the de-

fendant, were not called on.

James, L.J.: I am of opinion that the order of the Master of the Rolls cannot be reversed or altered. I also think that he is right in saying that the question is quite new in equity (certainly no such case has been cited) whether a mere breach of covenant would entitle a person with whom a covenant has been made to profits. It is quite clear also that in partnership matters there must be the utmost good faith, and that there is to that extent a fiduciary relation between the parties. That is to say, one partner must \*not directly or indirectly use the partnership assets for his own private ben-He must not, in anything connected with the partnership, take any profit clandestinely for himself, nor must be carry on the business of the partnership or any business similar to the business of the partnership in his own or another name separate from it, otherwise than for the benefit of the partnership. As Mr. Justice Lindley has put it in his book, he must not carry on any other business in rivalry with the business of the partnership, because in truth, if he does carry on the very same business in rivalry with the partnership, the option of the other partners seems to be to say,—That was a business within the scope of the partnership, and although you did it secretly or in connection with some other person, I elect to take the profits of it, because it was part of the business for which the partnership was established, and I elect to say that what you have been doing nominally for yourself, but really for the partnership, was for the benefit of that partnership.

But here, what has been done is this: The defendant has not entered into any business in any way analogous to or connected with the business of the firm, except in a very trifling manner. The business of the firm was to deal as merchants and brokers, selling on commission the produce of salt works. The business which the defendant has entered into was that of manufacturing the salt, which was to be the subject-matter of the trade of the first firm. If in that he had in any way deprived the firm of any profits they otherwise would have made—if by his joining in the partnership for the manufacture he had diverted the goods from

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the firm in which he was a partner to some other firm, I can see that that would be a breach of his duty, but it is not pretended or alleged that any alteration took place in the business of the firm by reason of his having become a shareholder in the other business. It is not pretended that there was any alteration in the commission or anything else. Everything remained exactly as it was, so that it cannot be suggested that there was a farthing's worth of actual damage done to the original firm by reason of his having become a shareholder or partner in the works which produced the thing in which the firm traded.

Under these circumstances, it seems to me that we cannot say his profit from the new business was a benefit arising 352] out of his \*partnership with the plaintiffs. It was not a benefit derived from his connection with the partnership, or a benefit in respect of which he was in a fiduciary relation to the partnership. His relation to the partnership in this respect was the same as an ordinary covenantor to a covenantee in respect of any other covenant which is broken. It was a covenant by a partner with a copartner, a covenant that he would not do something which might result in damage. But it was not a covenant, in my view, which was in any way connected with the fiduciary relations between

the parties.

That being so, it seems to me that the Master of the Rolls was right in saying that you cannot extend the cases with regard to a share in the profits to a case in which as between the parties there really was nothing but a breach of covenant, which in truth did not result, and could not have resulted, in the slightest loss to the partnership, unless it could have been shown that it led to the covenantor neglecting the business of the partnership, and devoting himself to other business, and diverting his time and attention from the business to which it was his duty to attend. That would have been a matter for an action for damages if it could have been alleged or shown here. But there is no allegation of the kind here, nor, indeed, does it appear that he was anything more than a sleeping partner in the business of Ashton & Sons. I think, under these circumstances, that, as no damage was sustained, or could be sustained, there was no ground for giving an account of profits.

I also agree with the Master of the Rolls in saying this, that the share which the defendant acquired after the dissolution of the partnership in that new business cannot be considered as something arising from or out of the partnership, as in the case of a partner taking a renewed lease, or

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anything of that kind. I think that notion is extravagant and entirely without foundation.

On the whole, therefore, I am of opinion that the decision of the Master of the Rolls ought to be affirmed, and the ap-

peal dismissed with costs.

COTTON, L.J.: There is no doubt in this case that the defendant committed a breach of the partnership articles. That is quite clear. The \*only question is, to what are the [353 plaintiffs entitled? I will first of all deal with the question of the construction of this clause. Does that entitle the plaintiffs to say, as a matter of construction, that the defendant, having engaged in this business, did so for the benefit of the partnership and on account of the partnership? I perfectly agree with the Master of the Rolls that this is not the meaning of the covenant—whether it is or not the common form I think this is not material—I think it is intended to prevent him from entering into any business except the partnership He is to confine his whole time and attention to business. that; and I think the effect of the covenant is not to enable the parties to say that, besides being restrained from entering into any business, he is also by this covenant, as a matter of construction and as a matter of contract, to give his partners the option of claiming whatever he makes by engaging in any other business as profits made on account of the partnership.

I have more doubt on the general principles of partnership, but the only case which was cited is one entirely different from this—I mean the case of Somerville v. Mackay (1). Certainly one is struck with this, that Lord Eldon did not express a doubt as to the right to the profits. I think that he did consider the plaintiffs entitled to an account of the profits, but the cases are entirely different. There the plaintiff and defendant had agreed to enter into a joint adventure or partnership for the purpose of exporting goods to Russia, and there was a special provision that the partners should not, on their separate account, export goods to that country or to the particular person named; and the defendant had exported goods to Russia and to the person named. case, therefore, the business in which he had engaged contrary to the partnership contract was within the scope of the partnership. It was partnership business, except for his attempt to withdraw it from the partnership contract, and to say that he was entitled to the profits of it for his own That, of course, could not be allowed. But, in my opinion, it has no bearing upon the present case, where the

business in which the defendant engaged was in no way within the scope of the partnership. No doubt it is dealing with the same article—salt, but it is dealing with it in a \*totally different way, and I do not understand that the profit he made was made out of the firm in which he and the plaintiffs were engaged. The firm in which he, in violation of the partnership contract, engaged, were manufacturers of salt, selling their salt through the firm in which he was engaged with the plaintiffs. There are clear rules and principles which entitle one partner to share in the profits made by his copartners. If profit is made by business within the scope of the partnership business, then the partner who is engaging in that secretly cannot say that it is not partnership business. It is that which he ought to have engaged in only for the purposes of the partnership. Again, if he makes any profit by the use of any property of the partnership, including, I may say, information which the partnership is entitled to, there the profit is made out of the partnership property, and therefore, of course, it must be brought into the partnership account. So, again, if from. his position as partner he gets a business which is profitable, or if from his position as partner he gets an interest in partnership property, or in that which the partnership require for the purposes of the partnership, he cannot hold it for himself, because he acquires it by his position of partner, and acquiring it by means of that fiduciary position, he must bring it into the partnership account. That is the obligation arising from the fiduciary relation which partners bear one to another. But in the present case, notwithstanding there has been a breach of the contract (and I have dealt with it as a matter of contract), it does not give the plaintiffs the right they claim. These profits being derived from a trade not within the scope of the partnership business, not having been acquired by him by reason of his connection with the firm, or by any use of the firm's property, in my opinion, the plaintiffs are not entitled to say, "We will have the profits which you made by engaging in the way in which you did in this entirely separate business."

As regards the second suit, that is disposed of by what I have already said. This property was not in any way acquired by means of his position as partner, and therefore I can see no ground upon which the plaintiffs can claim to be entitled to that which I assume is valuable property.

355] \*Thesiger, L.J.: There has been in the present case a clear breach of the clause upon which this question turns, but that clause does not prescribe the remedy or rem-

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edies to which the partners may be entitled in the event of such a breach taking place. Consequently we have to look to the general principles of law in order to see what those remedies are, and what is the relief to which these particular

plaintiffs are entitled.

It is clear that, there having been a breach of the contract, an action at law would arise, but that action at law in the present case would not suit the plaintiffs, because it is not disputed that although the defendant may have been guilty of a breach of contract, there has been no loss sustained by the partnership in consequence of that breach of contract, and, therefore, although, technically speaking, an action at law would lie, the result of that action would be nothing but nominal damages. The plaintiffs therefore seek, instead of damages at law, to recover relief by following the profits which have been made by the defendant. Now, they must obtain those profits upon some well established principle of law or equity, and I cannot in this case find any such principle.

Several cases were cited by Mr. Chitty, and the principles which are to be collected from those cases seem to resolve themselves into three, which have been correctly stated by Mr. Justice Lindley in his book upon Partnership ('). first of those principles is that a partner shall not derive any exclusive advantage by the employment of the partnership That principle has been illustrated in two cases which have been cited. The first is the case of Burton v. Wookey ('), where mineral ore was obtained by one of the partners by means of the sale of partnership goods. second of those cases is the case of Gardner v. M'Cutcheon ('), where, two persons being part owners of a ship which was being employed in trading for the common benefit of the part owners, one of those part owners used that ship for the purpose of a private trading of his own, and it was held that the other part owner was entitled to follow the profits thereby \*made. The second principle which is to be [356] collected from the cases is, that a partner is not to derive any exclusive advantage by engaging in transactions in rivalry with the firm. That principle is illustrated by the case of Somerville v. Mackay ('), if that case is to be treated as a decision at all upon the point. There, the partnership being mainly founded for the purpose of supplying goods in Russia to a firm of Anderson & Co., the defendant himself had during the period of the partnership been supply-

<sup>(1)</sup> Page 609. (2) 6 Madd., 867.

<sup>(8) 4</sup> Beav., 584. (4) 16 Ves., 382.

ing goods of the same character to that same firm. case to the same effect was the case of Lock v. Lynam (1), decided by the Irish Lord Chancellor, in which, the partnership being for the purpose of supplying meat to the government, one of the partners had been engaged with other persons in the supply of meat to that same government. The third principle which is to be collected from the cases is, that a partner is not allowed in transacting the partnership affairs to carry on for his own sole benefit any separate trade or business which, were it not for his connection with the partnership, he would not have been in a position to That has been illustrated by those cases to which carry on. Mr. Chitty referred of a partner obtaining behind the back of another partner a renewed lease of the premises upon which the partnership business is carried on, and in which it has been held that on the dissolution of the partnership the partnership is entitled to that renewed lease as a part of the assets of the firm. Similar to these cases is that of Russell v. Austwick (1), which was a case of a partnership where two persons having joined in business as carriers under a contract with the mint to carry bullion between London and Falmouth, one of the partners, by virtue of his position as contractor, obtained a further contract in his own name for carrying silver for the mint by another route.

Now, it seems to me that those principles do not in any way apply here. First, there has not been any advantage obtained by the employment of partnership property. Secondly, it is not disputed that the transactions with the other firm were transactions which were in no way in rivalry with the partnership to which the plaintiffs belonged; and, 357] thirdly, it cannot, as it appears to me, be \*reasonably argued that the contract of partnership with Ashton & Sons was obtained by virtue of, or was in any way a consequence from, the partnership which existed between the plaintiffs and the defendant. If we were in the present case to extend the principles beyond those which have been established by previous cases, there is no reason why the plaintiffs should not have sought to have recovered the profits of any business in which the defendant might have engaged, although that business might have been entirely unconnected with the subject-matter of the business of the

partnership.

Solicitors: Cunliffe & Beaumont, agents for T. Wilkinson, and Bartlett & Atkinson, Liverpool; F. Venn & Son, agents for J. Quinn & Sons, Liverpool.

<sup>(1) 4</sup> Ir. Ch. Rep., 188.

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The principal case went upon the ground that the business in which the partner engaged was not the same as that of the partnership, and that the outside business did not materially affect the business of the partnership.

Where the outside business is substantially the same, the partner engaging in it would be bound to account for the profits thereof: Parsons on Part. (3d ed.), 246-249, marg. p. 225-228; 1 Story's Eq. Jur., § 667; Story on Part., § 177; Todd v. Rafferty, 30 N. J. Eq., 254, 256-7, 259-261; Herrick v. Ames, 8 Bosw., 115; American, etc., v. Edson, 56 Barb., 84, 89-90, 1 Lans., 388; Bast's Appeal, 70 Penn. St. R., 301, 307. See Lock v. Lyman, 4 Irish Chy., 188;

See Lock v. Lyman, 4 Irish Chy., 188; Hellman v. Reis, 1 Cin. Supr. Ct. R., 30; Cowry v. Cobb., 9 La. Ann., 592; Merchants, etc., v. Holland, 4 Hun, 420, 66 N. Y., 648.

One partner may be restrained from carrying on a similar business elsewhere: Marshall v. Johnson, 33 Geo. 500

One partner may, in good faith, purchase and hold for his use the reversion of real estate, occupied by the partnership, under a lease for years: Anderson v. Lemon, 8 N. Y., 236, reversing 4 Sandf., 552.

But where one partner secretly makes such purchase in his own name, whilst the other, with his concurrence, is negotiating with the owner to obtain the property for the use of the firm, the purchaser will be declared a trustee for the use of the firm: Anderson v. Lemon, 8 N. Y., 236, reversing 4 Sandf., 552.

Where, during the existence of a continuing partnership of undetermined duration, three of four copartners, without the knowledge of the other, obtain a new lease in their own name of premises leased and used by the firm, the same becomes partnership property, and upon dissolution, the

other partner is entitled to his proportion of its value: Struthers v. Pearce, 51 N. Y., 357; Leach v. Leach, 18 Pick., 68; Weston v. Ketcham, 39 N. Y. Superior Ct. R., 54.

So in certain cases, if taken after partnership dissolved: Clegg v. Fishwick, 1 Macnaghten & Gord., 294, 298 (Am. ed.), and Mr. Perkins's note.

One member of a copartnership cannot, during its existence, without the knowledge of his copartners, take a renewal lease, for his own benefit, of premises leased by the firm upon which it has made valuable improvements, and by the joint efforts of the members made the good-will valuable and enhanced the rental value of the premises, and this, although the time of the renewal lease does not begin until after the copartnership has expired by its own limitation. A lease so taken by one partner in his own name enures to the benefit of the firm, and the partner in whose name it is taken can be required to account to his copartners for its value.

It is not material that the landlord would not have granted the new lease to the other partners or to the firm: Mitchell v. Reed, 61 N. Y., 123, reversing 61 Barb., 310; Scruggs v. Russell. McCahen. 39.

sell, McCahen, 39.

Where a partner fraudulently, without the consent of his copartners, applies the partnership funds to his private purposes and profit, or invests the same in his own name and for his own use, his copartners may, if they can distinctly trace the investment, follow it, and treat it as trust property held for the benefit of the firm by the partner or by any person in whose hands it may be, except a bona fide purchaser without notice: Kelly v. Greenleaf, 8 Story, 93; Fairchild v. Fairchild, 5 Hun, 407, 64 N. Y., 472; Partridge v. Wiels, 30 N. J. Eq., 176, affirmed 31 id., 362.

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[8 Chancery Division, 357.]

C.A., March 27, 1878.

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[1872 B. 77.]

## Fines for Renewal-Tenant for Life and Remainderman.

In 1838 property was demised for a term determinable on the dropping of three lives, reserving a yearly rent and a heriot payable on the dropping of each life, with a covenant for perpetual renewal at a specified fine on the dropping of each life. In 1869 the persons who had then become absolute owners subject to the lease settled the property in strict settlement, giving to a trustee ample powers of management, with powers to grant leases with or without covenants for renewal, and to perform any covenant for renewal previously entered into by any previous owner, or by the trustee for the time being, so that in every such appointment, lease, or demise, the best rent be reserved without taking any fine or premium. During the continuance of a tenancy for life under this settlement two lives dropped, and on each occasion a heriot was paid and the lease renewed by the trustee at a fine in pursuance of the covenant:

Held, by Bacon, V.C., that the fines and heriots ought to be treated as moneys arising under a power of sale and exchange, and to be invested in lands to be settled

to the same uses.

Held, by the Court of Appeal, that the powers given to the trustee did not affect the question, and that the fines and heriots were casual profits payable to the tenant for life.

By an indenture dated the 7th of February, 1838, made between George Player and Mary Anne his wife, of the one 358] part, and George \*Astley of the other part, Player and wife, in exercise of a power of leasing contained in a settlement of the 23d of July, 1822, under which they were successive tenants for life, demised a piece of land, being the site of a messuage afterwards erected and called Wellington Lodge, to Astley, his executors, administrators, and assigns, from the 10th of October, 1837, for the term of ninety-nine years, if three persons therein named or any of them should so long live, at the yearly rent of £36, and the payment upon the dropping of each of the lives of £1 10s. for a heriot. The lease contained covenants by Astley, to build, and a covenant by Player and wife that they and their assigns and the person and persons for the time being entitled to the next immediate reversion and inheritance of the demised premises would from time to time and at all times forever thereafter renew the then present and every future lease of the premises upon the terms therein mentioned, that was to say, upon the death of any one of the lives by which the then present or any future lease should from time to time be determinable, would grant a new lease of the premises to Astley, his executors, administrators, and

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assigns, for a new term of ninety-nine years, determinable with the then two remaining lives and the life of such other person as Astley, his executors, administrators, or assigns should nominate for a new life instead of the person so dead, on payment of £180 for a fine, provided such request and nomination should be made and the said fine paid within six months after the death of such life, and afterwards for £360, provided such request, nomination, and payment should be made within six months after the expiration of the first six months, or in default thereof the fine for renewal should be at the will of the lessors. It was not disputed that the power of leasing, which was a special one, authorized these stipulations for renewal, which were admitted to be binding.

The lease was renewed in June, 1874, when a fine of £360 and a heriot of £1 10s. were paid, and again in March, 1875, when a fine of £180 and a heriot of £1 10s. were paid. The question was as to the destination of these sums, amounting to £543, and arose under the following circumstances:

In 1867 Elizabeth Lydia the wife of Thomas Robert Brigstocke had become entitled in fee to one moiety of the prop-

erty subject to the above lease, and of other property.

\*By indenture dated the 26th of July, 1867, Brig- [359] stocke and wife assured her moiety of the property to the use of such person or persons for such terms of years, and either absolute or determinable on a life or lives, and at, under, and subject to such yearly rents and other payments, and to such covenants and agreements, as Brigstocke during his life, or as Mrs. Brigstocke after his death, should grant and demise the said moiety, and subject to any grant or demise to be so made, and also subject to any terms of years then already granted, to the use of Mrs. Brigstocke and her assigns during her life for her separate use, with remainder to the use of Brigstocke for life, with remainder to such uses as Mrs. Brigstocke should by deed or will appoint.

By indenture dated the 1st of September, 1869, Mrs. Brigstocke, under the last mentioned power, appointed that the above mentioned moiety should, after the decease of the survivor of the husband and wife, and subject to the power of demising contained in the indenture of the 26th of July, 1867, and to all estates created by virtue of that power, remain and be to such uses as W. Benett P. Brigstocke (hereinafter called Benett Brigstocke) or other the person or persons to be appointed in his place as thereinafter mentioned (all of whom were thereinafter referred to as "the

25 Eng. Rep.

manager") should, during the life of the survivor of the five children of Mr. and Mrs. Brigstocke, and the period of twenty-one years after the death of such survivor, in exercise of the powers of management, sale, exchange, and leasing, thereinafter contained, in his and their absolute and uncontrolled discretion, appoint, and in default of such appointment, and so far as no such appointment should extend, to the uses thereinafter declared, namely, as to a certain part of the property described as George's Moiety and Gatehouse, to the use of George C. H. P. Brigstocke (hereinafter called George Brigstocke) for life, with remainder to trustees for a term of 1,000 years, to raise portions for his younger children. with remainder to his first and other sons successively in tail, with remainder to his daughters as tenants in common in tail, with cross remainder in tail, with remainder to Benett Brigstocke for life, with similar limitations in favor of his issue. with ultimate remainder to the use of the right heirs of Mrs. Brigstocke. And as to the rest of the property (hereinafter 360] called Benett's Moiety), to \*similar uses, except that the limitations to Benett Brigstocke and his issue preceded those to George Brigstocke and his issue. Mrs. Brigstocke further appointed that it should be lawful for the manager for the time being by deed to appoint in fee or by way of demise or lease, for one or more life or lives, with or without covenants for renewal or for perpetual renewal on the dropping of the lives in any such lease or any of them, or at any certain period, or by way of demise or lease for any term or number of years whatsoever, either certain or determinable, and either with or without covenants for renewal, or for perpetual renewal, all and every or any part of the hereditaments to any person or persons and his, her or their heirs, executors, administrators, or assigns, as the case might require, for the purpose of building, and to perform any covenant for renewal previously entered into by any previous owner, or by the manager for the time being, and also to accept a surrender of any such lease or appointment by way of lease as aforesaid, and if so thought fit the property therein comprised, with the houses and other buildings (if any) thereon erected or any part thereof, to appoint in fee, or by way of demise or lease in the like manner and for the like purpose as thereinbefore mentioned, unto such person or persons as should from time to time apply to make such surrender and for such appointment or demise or lease, with power to the manager to grant such liberties and privileges as therein mentioned to the lessees, so as in and by or upon every such appointment, lease, or demise, there should be reserved and Brigstocke v. Brigstocke.

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limited or settled and made payable unto or for the benefit of the person or persons successively who under or by virtue of the limitations thereinbefore contained would be or would have been entitled to the premises to be comprised in such appointments, leases, or demises, respectively, in case the same had not been made, the best and most improved yearly rent or rents, sum or sums of money in the nature of a ground rent or ground rents, to commence within ten years from the date thereof, and to be either progressive or not, and to be paid by two half yearly payments in every year that could or might be reasonably gotten for the same (taking into consideration in the case of the renewal of every such lease or demise and in every re-grant or re-demise the value of the \*grantee's or lessee's estate and interest then [36] subsisting) without taking any fine or premium, or anything in the nature of a fine or premium, for the making of such appointments, leases, or demises respectively, or for the renewal of any such lease or leases, or for such re-grant or re-The deed conferred upon the manager powers of sale and exchange, with the common trust for investing the moneys received on sale or exchange in the purchase of lands to be settled to the same uses as the lands sold or given in exchange, or for employing them in enfranchising copyholds, subject to the subsisting uses.

The other moiety of the hereditaments, of which one moiety was settled by the last mentioned deed, was at the time of the partition hereinafter mentioned vested in Mary H. P.

Brigstocke in fee.

By a deed-poll dated the 9th of December, 1869, some other property was assured to the same uses as those declared in the deed of the first of September, 1869.

Mr. and Mrs. Brigstocke died in 1871.

On the 23d of November, 1872, a decree was made in a suit in which George Brigstocke was plaintiff, and Benett Brigstocke and Mary Brigstocke were defendants, for a partition of the above property. On the partition the Wellington Lodge property comprised in the lease of the 7th of February, 1838, was included in the property allotted to the plaintiff George Brigstocke in severalty as tenant for life of "George's Moiety," under the settlement of the first of September, 1869.

The question now was whether the £543, consisting of the fines and heriots paid in 1874 and 1875, as mentioned above, belonged to the plaintiff George Brigstocke, or was to be treated as capital in which he had only a life interest. The question was raised on a petition presented by George Brig-

stocke, and Vice-Chancellor Bacon, considering the matter concluded by the terms of the leasing power contained in the settlement of the 1st of September, 1869, made a declaration that the £543, and all other the fines and heriots which then were or should thereafter become payable on the making of any renewed lease of the hereditaments in the petition mentioned, pursuant to the powers contained in the indenture of the 1st of September, 1869, and the deed poll of the 9th of December, 1869, were subject to the trusts declared by 362] the \*same indenture and deed-poll concerning moneys to arise from a sale of the same hereditaments.

The petitioner appealed.

Watson, for the petitioner: The Vice-Chancellor decided on the provision as to letting at the best rent, but the case does not turn on the powers which are inapplicable to the case of compulsory renewal at a fine. The fines must be treated as a part of the rents, and the tenant for life must have them just as he receives royalties on an open coal mine, though they are the price of a part of the inheritance: Milles v. Milles (1); Taylor v. Horde (2); Simpson v. Bathurst (3). Wingfield, contrà: A tenant for life has no power to

Wingfield, contrà: A tenant for life has no power to renew beyond his own life, except under the power, and as the power precludes the taking a fine, the fine must be

treated as capital

[JESSEL, M.R.: The lease is perpetually renewable. Is not the case like that of fines on the renewal of copyholds?

Earl Cowley v. Wellesley (').]

JESSEL, M.R.: I do not differ from the Vice Chancellor on the point to which his attention was directed, for his Lordship considered that he had only to decide on the construction of the power. I am of the opinion that the case does not depend on the power. The manager has power to renew and power to grant leases, including leases to be granted under a covenant for renewal. The power does not provide what is to be done with the fine where the covenant was for renewal at a fine; it might have proceeded to do so, and I should have expected to find there directions as to what should be done with it; but nothing is said, and I am so far from inferring that the manager was to invest the fine, that I think the directions show that he was not intended to invest it. We are left, then, to the general law. What is the position 363] of the tenant for life of a \*settled estate? He takes all casual profits which accrue during the time of his tenancy Thus the tenant for life of a manor takes the fines

<sup>(1) 6</sup> Ves., 760.

<sup>(9) 1</sup> Burr., 60.

<sup>(8)</sup> Law Rep., 5 Ch., 198.

<sup>(4) 85</sup> Beav., 685.

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arising from copyholds, because they become payable under an obligation arising from the custom. In some manors in the west of England copyholds are granted for lives, and fines paid on the substitution of fresh lives. These fines are received by the tenant for life. It is said that the tenant for life can admit to the copyholds, and no doubt he can. But why? Because it is necessary to the existence of the custom, which could not otherwise be complied with. tenant for life of an estate on which there are open mines receives the royalties payable in respect of the minerals gotten, though they are really instalments of the purchasemoney of part of the inheritance. In most cases fines are merely a mode of securing rent, and rents of two kinds, an annual rent and a rent payable at more distant intervals. A certain sum payable at certain intervals is as much rent as if it were an annual sum. It is true that a fine is in the nature of a payment of rent beforehand, but a tenant for life is entitled to rent made payable beforehand as much as to any other rent. All the analogies are in favor of the claim of the tenant for life in the present case.

Cotton, L.J.: I also am of opinion that the order of the Vice-Chancellor cannot be sustained. He decided the case upon the effect of the power in the settlement, but I cannot agree that the power settles the question. He relied on the circumstance that the power in the settlement contained a direction that no fine should be taken. But the settlement also contained a power to perform covenants for renewal previously entered into, and the direction that no fine should be taken cannot apply to the present case, where the property was, at the time when the settlement was made, demised by a lease which contained a covenant for renewal on payment of a fine; and the deed contains no provision that any part of a fine shall be settled. It appears that the Vice-Chancellor would, but for the power, have been in favor of the tenant for life. In most cases where provision is made by a settlement for granting leases at a fine, directions are given for investing the fine as capital, and \*hence a [364] notion has grown up that fines ought to be treated as capi-Here the lease was granted before the settlement, and there is no direction as to the application of the fines. see no reason why the tenant for life should not receive the fine for renewal. It is a casual profit, but a casual profit accruing during the tenancy for life.

THESIGER, L.J.: I am of the same opinion.

Solicitor for all parties: Edward S. Alderson.

Ex parte Rabbidge.

In re Pooley.

## [8 Chancery Division, 864.]

C.J.B., March 11: C.A., March 28, 1878.

#### Ex parte VINE. In re Wilson.

Undischarged Bankrupt—Property passing to Trustee—Damages in Action of Tort— Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 4, 15.

Under the Bankruptcy Act, 1869, as before it, damages in an action for a personal tort recovered by an undischarged bankrupt do not pass to his trustee.

Though, if the bankrupt had accumulated the money and invested it in property, the trustee might be entitled to the property, yet he cannot intercept the damages or prevent the bankrupt from expending them in the maintenance of himself and his family.

Decision of Bacon, C.J., affirmed.

## [8 Chancery Division, 367.] C.A., March 28, 1878.

#### 3671 \*Ex parte RABBIDGE. In re Pooley.

Protected Transaction—Contract for Sale of Land—Payment of Purchase-money to Vendor after Adjudication of Bankruptcy, but without Notice of Adjudication—Rights of Purchaser—Advertisement of Adjudication—Delay—Assignee of Chose in Action—Notice—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 11, 15, 94, 95.

A bankrupt had, before adjudication, the purchaser having had no notice of any act of bankruptcy, contracted to sell some leasehold property, and had received a deposit in respect of the purchase money. After the adjudication had been made, but before it had been advertised, the purchaser, having no notice of the adjudication, paid the remainder of the purchase-money to the bankrupt:

Held (reversing the decision of the Registrar), that the trustee in the bankruptcy could not be compelled to assign the lease to the purchaser except upon the terms of

his paying the purchase-money.

Whether, if the lease had been assigned before the adjudication, but a part of the purchase-money had not been paid, and the purchaser had, after the adjudication, paid it to the bankrupt, without notice of the adjudication, he could have been compelled to pay it over again to the trustee, quære.

Observations per James, L.J., on the practice of delaying advertisements of

adjudications.

This was an appeal from a decision of Mr. Registrar Mur-

ray, acting as Chief Judge in Bankruptcy.

On the 19th of September, 1876, W. A. Pooley entered into a contract with Joseph Dierden for the sale to him of an undivided moiety of some leasehold property known as the 368] Oak Brewery, at \*Canning Town, Essex, for £725. Dierden paid a deposit of £25, and also accepted a bill of exchange for £200 drawn by Pooley, in part payment of the purchase money. At this time proceedings in bankruptcy were pending against Pooley, a bankruptcy petition having been presented against him many months previously, but no adjudication had been made. Dierden alleged that he had

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no notice of the petition or of any act of bankruptcy committed by Pooley and available against him for adjudication. On the 20th of September, 1876, Pooley was adjudicated a bankrupt, but the advertisement of the adjudication was stayed to enable him to appeal against it, and it was not advertised until the 31st of March, 1877. On the 27th of October, 1876, Dierden paid Pooley £500, the balance of the purchase-money, by means of £150 cash, two acceptances for £125 each, and a third acceptance for £100. deeds of the property were handed over to him, but no assignment of the lease was executed. When this transaction took place, Dierden, as he alleged, had no notice of the adjudication. After he became aware of it he applied to the Court of Bankruptcy to order the trustee in the bankruptcy to assign the property to him. When he gave notice of the application he had paid two of the acceptances to the holders of them, and before the application was heard he had paid the two other acceptances. The Registrar came to the conclusion, upon the evidence, that, at the time when the contract for sale was entered into. Dierden had no notice of the bankruptcy proceedings, or of any act of bankruptcy available for adjudication against Pooley, and that, when Dierden completed the purchase, he had no notice of the adjudication, and his honor ordered the trustee to execute an assignment of the bankrupt's interest in the property to Dierden.

His honor was of opinion that, according to the settled practice in bankruptcy, a person who pays a debt to a bankrupt after adjudication, without notice of the adjudication, cannot be compelled to pay it over again to the trustee, and that, consequently, the equitable lien on the property for the unpaid purchase-money ceased to exist when it was paid to the bankrupt, and the trustee in the bankruptcy became a trustee of the leasehold property for the purchaser.

The trustee appealed.

\*Winslow, Q.C., and J. Shiress Will, for the ap- [369 pellant: It may be a question whether the agreement of the 19th of September is protected, for we say that Dierden had at that time notice of an act of bankruptcy. But, whether that be so or not, the payment of the money after the adjudication is not protected. At that time the legal estate in the leasehold property was vested in the trustee, and he cannot be ordered to assign it to Dierden, except on the terms of the unpaid purchase-money being paid to him: Bankruptcy Act, 1869, ss. 11, 94, 95.

[They were stopped by the court.]

De Gex, Q.C., and J. Henderson, for Dierden: We admit that the protection given by sects. 94 and 95 does not extend to payments made after adjudication. The protection given by some of the older bankruptcy statutes extended to payments made to a bankrupt even after adjudication, if made without notice of the adjudication. But those statutes only declared the general law in bankruptcy upon which the Registrar has acted in holding the payment good as against The Registrar relied upon Sowerby v. Brooks ('), the trustee. which supports his conclusion.

[JAMES, L.J.: If you are right, the protecting sections

94 and 95 would be nugatory.]

The trustee in the bankruptcy must be taken to have had notice of the contract for sale, because the bankrupt had notice of it. But the Registrar's decision may be supported on the ground that Dierden was a trustee of the unpaid purchase money for the person really entitled to it, and, as he had received no notice of the title of the trustee in bankruptcy, he was entitled to pay the money to the bankrupt, of whose original title alone he was aware. The trustee ought to have completed his title by notice: Dearle v. Hall (\*); Loveridge v. Cooper (\*); In re Hughes' Trusts (\*); In re Barr's Trusts (\*); In re Atkinson (\*); Stocks v. Dob-370] son('); \*Stuart v. Cockerell('); In re Russell's Policy Trusts('); Birmingham Banking Company v. Carter ("). Lysaght v. Edwards (") shows that the trustee in the bankruptcy was a trustee of the property for the purchaser.

JAMES, L.J.: It appears to me that the order of the Registrar cannot be sustained. The fallacy of the argument consists in treating the unpaid purchase-money as being simply a chose in action, to which cases like Loveridge v. Cooper (\*) can apply. It is not anything of the kind. bankrupt, who was the owner of real estate, entered, before the adjudication was made, into a contract to sell it, a contract which I will assume for the present purpose was a transaction protected by sects. 94 and 95 of the act. result was that, upon the adjudication being made, the legal estate in the property vested in the trustee in the bankruptcy, subject to the equity of the purchaser under the contract. That equity gave him a right to have the property conveyed to him, upon payment of the purchase-money to the person to

<sup>(1) 4</sup> B. & A., 528.

<sup>&</sup>lt;sup>2</sup>) 3 Russ., 1.

<sup>(\*) 3</sup> Russ., 80. (\*) 2 H. & M., 89.

<sup>5) 4</sup> K. & J., 219.

<sup>(6) 2</sup> D. M. & G., 140.

<sup>(\*) 4</sup> D. M. & G., 11. (\*) Law Rep., 8 Eq., 607.

<sup>(\*)</sup> Law Rep., 15 Eq., 26; 5 Eng. R., 694.

<sup>(&</sup>quot;) 2 Ch. D., 499; 17 Eng. R., 594.

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whom the property belonged. It is the purchaser's misfortune that he has paid the money to a person who had then ceased to be the owner of the property. But that can give him no equity to take the property away from the real owner without paying him for it. It is nothing more than a case where the purchaser of property has paid his purchasemoney to a person whom he thought to be the owner of the property, but who was not so in fact. Is there in such a case any equity to take the property away from the real owner without paying him the purchase-money? I am of opinion that there is not. The order of the Registrar must there-

fore be discharged.

COTTON, L.J.: I also am of opinion that the Registrar's order is wrong. The whole difficulty has arisen from considering the trustee in the bankruptcy as if he were an assignee of the purchase-money as a \*chose in action and nothing else. He had vested in him the estate of the bankrupt in the property. He was not in the fullest sense of the word a trustee of the property for the purchaser, because the whole of the purchase money had not been paid. But he took the legal estate in the property, subject to the equity of the purchaser under the contract, which gave the purchaser a right to say, Convey me the estate on my paying the purchase-money. The purchaser has chosen voluntarily to pay the money to the bankrupt; the bankrupt could not have compelled him to pay it, because he was not in a position to say that he was ready and willing to convey the estate. The purchaser has paid the money to a person who has no title to the estate. How can the real owner be compelled to convey the estate without payment of the purchase-money? The whole difficulty has arisen from considering the trustee as the assignee of the purchase-money as distinct from the estate, which is not his real position.

THESIGER, L.J.: I am entirely of the same opinion. If the trustee were simply an assignee of a debt due to the bankrupt—if, for instance, the property had been conveyed to the purchaser before the adjudication, but the whole of the purchase-money had not been paid, there might possibly have been some ground for the argument that payment of the unpaid purchase-money to the bankrupt after the adjudication, but without notice of it, would have been good. As to that I express no opinion. But the position of the trustee in this case is very different from that of a mere assignee of the purchase-money. He is the actual legal owner of the estate, and he is only bound to convey it away on payment of the purchase-money, and would have, after con-

25 Eng Rep. 4

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veyance, an equitable lien on the property for any unpaid purchase-money. The bankrupt had no right to call for the money after the adjudication was made, unless the payment was one protected by the act, or unless the payment can be considered as having been made to him in the character of an agent for the trustee. The payment is not protected by the act, because it was made after the adjudication, and it was clearly not made to the bankrupt as agent for the trustee. The trustee had no notice of the contract for sale, and a bankrupt has no implied authority to receive money for his trustee.

372] \*The appeal was allowed, with costs.

JAMES, L.J.: It is much to be regretted that the advertisements of adjudications are so often postponed. These delays are a source of great mischief. It may be very hard on a debtor, who has been adjudged a bankrupt, not to stay the advertisement of the adjudication, if he has a bona fide ground for appealing; but, on the other hand, great hardship may be done to other persons if the adjudication is not advertised.

Solicitor for trustee: J. N. Mason, agent for Sankey, Son & Flint, Canterbury.

Solicitor for purchaser: J. Pettengill.

See 17 Eng. Rep., 615 note; 20 Eng. Rep., 699 note.

It seems that the rights of a prior purchaser in possession of lands under an executory tontract of sale are not affected by the statutory foreclosure of a subsequent mortgage, although he is served with notice of sale. It seems such purchaser can safely make payments on the contract to his vendor until he has actual notice of the subsequent mortgage: Dwight v. Phillips, 48 Barb., 116.

See Trustees v. Wheeler, 61 N. Y., 38.

The lien of a judgment on land is subject to the equitable rights of a party in the occupation thereof, under a prior contract to purchase the same from the judgment debtor.

The docketing of the judgment is not notice thereof to such purchaser, and payments subsequently made by him to the judgment debtor pursuant to his contract, without actual notice of the judgment, are valid as against its lien upon the land.

And where, while the purchaser of land by contract was in possession, a judgment was recovered against the vendor, and the land sold on an execution issued thereon and bid off by the plaintiff in the judgment, who transferred the sheriff's certificate to a third person, to whom the sheriff executed a deed, and the purchaser, after the sale on execution and before the sheriff conveyed, without actual notice of the judgment or the proceedings thereon, made payments pursuant to his contract to the judgment debtor: Held, in an action by the purchaser against the grantee in the sheriff's deed for a specific performance of the contract, that such payments were valid and that the latter was bound to convey the land on being paid the amount due on the contract, after applying the payments made to the judgment debtor.

Payments made by such a purchaser to the judgment debtor without notice, after the execution of the sheriff's deed, would be valid against the grantee therein.

The recording of the sheriff's deed is not notice thereof to a party who contracted with the judgment debtor to purchase the land, and entered into C.A.

possession prior to the recovery of the judgment: Moyer v. Hinman, 13 N. Y., 180.

The recording of an assignment of a mortgage is not necessary within any of the general registry acts (before the Revised Statutes). It is therefore no notice to a mortgagor so as to render payments by him to the mortgagee in his own wrong, nor is it notice to a subsequent assignee of the mortgage, nor to a subsequent purchaser or mortgagee of the premises: James v. Morey, 2 Cow., 246; Trustees, etc., v. Wheeler, 61 N. Y., 88.

The mere recording of an assignment of a mortgage is not of itself legal notice to the mortgagor of such assignment, so as to invalidate a payment made by him or his heirs or his representatives to the assignor.

The recording of the assignment of a mortgage is only constructive notice of such assignment as against persons claiming by virtue of some subsequent assignment or conveyance from the mortgagor or assignor of the mortgage, or his representatives: N. Y. Life, etc., v. Smith, 2 Barb. Chy., 82.

See also Clute v. Robison, 2 Johns, 595; Gilleg v. Maas, 20 N. Y., 192, 209; Trustees, etc., v. Wheeler, 61 N. Y., 88; Bank v. Frank, 45 N. Y. Superior Ct. Rep., 404; Greene v. Warnick, 64 N. Y., 220; Vanderkemp v. Shelton, 11 Paige, 28; Pickett v. Barron, 29 Barb., 505; Ely v. Scofield, 35 Barb., 330; Purdy v. Huntington, 46 Barb., 387; Belden v. Meeker, 2 Lans., 470; Twitchell v. McMurtie, 77 Penn. St. Rep., 383; St. John v. Spalding, 1 Thomp. v. Cooke, 483.

Though the party so paying should require the production of the mortgage: Kellogg v. Smith, 26 N. Y., 18. But see Pepper's Appeal, 77 Penn. St., 378.

The equity which entitles a subsequent mortgage incumbrancer to the benefit of a release executed by a first

mortgagee, arises only when the first morgagee gives the release with knowledge of the existence of the subsequent mortgage; and if the release is executed without notice of existing equities on the part of the subsequent incumbrancer, the first mortgagee is not responsible for the consequences of his act, nor is the lien of his mortgage in anywise impaired. The recording of the subsequent mortgage will not operate as constructive notice of its existence to the prior mortgagee: Ward's Exr. v. Hague, 25 N. J. Eq., 397.

In West Virginia, under the statutes

In West Virginia, under the statutes of that state, where a contract in writing was executed for the sale of land, before judgments were obtained against the vendor, and the deed executed in pursuance of said contract was not recorded until after the said judgments were duly docketed, and the contract was never recorded, such contract and deed are void as to such creditors; and the land so contracted to be sold, and so conveyed, is subject to the judgments: Anderson v. Nagle, 12 West Va., 98.

So in Virginia: McClure v. Thistle, 2 Gratt., 182; Withers v. Carter, 4 Gratt., 407; Floyd v. Harding, Id., 401.
But see Young v. Devries 31 Gratt

But see Young v. Devries, 31 Gratt., (Va.), 804.
A tract held by an equitable title was divided by partition in the Or.

A tract held by an equitable title was divided by partition in the Orphan's Court and charged with the widow's interest. The allottees subsequently acquired and shared the legal title by conveyances, in which there was no allusion to the equitable title or the partition, or the charge in favor of the widow. Held, that these conveyances, although recorded, were not notice to a bona fide purchaser at sheriff's sale of a portion of the tract, and that no recovery could be had, from such purchaser, of the arrears due the widow: Dickinson v. Beyer, 87 Penn. St. Rep., 274.

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[8 Chancery Division, 872.] C.A., March 29, 1878.

## MOET V. PICKERING.

[1876 M. 295.]

Trade-mark-Infringement-Lien for Costs on the fraudulent Article-Lien of Wharfinger-Costs of Stakeholder.

A wine merchant brought an action against another wine merchant to restrain him from pirating his trade-mark by branding it on the corks of his bottles. Some of the wine in bottles with the pirated trade-mark was in the warehouse of certain wharfingers who were made defendants to the action. In their defence they disclaimed all interest in the matter in dispute, and submitted to act as the court might direct upon having their charges and costs paid. At the trial they contended at the bar that the plaintiff, if his right was established, ought not to touch the bottles for the purpose of removing the branded corks without first paying their charges:

Held (reversing the decision of Fry, J.), that the wharfingers had done nothing to disentitle them to their costs of the action; and that if the plaintiff had any lien on the wine for his costs it must be postponed to the wharfingers' lien for their charges.

But, quære, whether the plaintiff had any lien on the wine.

Upmann v. Elkan (1) questioned.

This was an appeal from a judgment of Mr. Justice Fry ('). The action was brought to restrain an alleged infringement of the plaintiff's trade-mark.

\*The plaintiffs, Messrs. Moet & Chandon, were producers and shippers of champagne at Epernay, in France. Their wine had acquired a high reputation as Moet & Chandon's champagne. They were in the habit of placing on the bottom of each cork with which their wine of one particular quality was bottled a brand consisting of the letters "M. & C." together with a star, and the word "England" was

branded on the side of the cork.

The defendant Joseph Pickering was the consignee of fifty cases of champagne not grown by the plaintiffs, in bottles with corks branded with a brand similar to that of the plain-This wine was in the possession of Messrs. Besley & Wilson, wharfingers in London, who were also made defendants to the action. The plaintiffs claimed an injunction, and an order that the fraudulent corks might be removed from the bottles and delivered to them.

By their statement of defence Besley & Wilson said that they received the champagne which was in their possession from Pickering in the ordinary course of business and without any knowledge that the brand on the corks was a fraudulent imitation of the plaintiffs' brand. The statement contained the following submission: "These defendants

<sup>(1)</sup> Law Rep., 12 Eq., 140; Law Rep., 7 Ch., 130; 1 Eng. R., 474. (2) 6 Ch. D., 770; 28 Eng. R., 834.

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submit to act in relation to the said fifty cases of champagne in every respect as this honorable court shall direct, upon the said charges for rent or warehousing and sampling which have accrued and shall accrue due being paid or provided for, and upon their costs, charges, and expenses of this action being paid or provided for."

At the trial of the action the defendants Besley & Wilson claimed a lien for their warehouse charges in priority to any claim by the plaintiffs, and insisted that the bottles ought not to be touched for the purpose of removing the fraudu-

lent corks until such charges were paid.

Mr. Justice Fry granted an injunction against all the defendants, and an order that the wharfingers should remove the corks from the bottles in the presence of the plaintiffs. And he made a declaration that all the defendants should pay the plaintiffs' costs of the action, and that the plaintiffs were entitled to a lien for their costs on the wine in priority to the lien of Besley & Wilson for their warehouse charges.

From this judgment Besley & Wilson appealed.

\*Cookson, Q.C., and B. Eyre, for the appellants: [374] We did not contest the claim of the plaintiffs against Pickering. By our defence we submitted in the usual form to such order as the court might direct, and claimed our warehouse charges and costs of suit. And at the hearing we contended that if the plaintiffs had a lien on the wine for their costs, it ought to be postponed to our lien as wharfingers for warehouse expenses. There was no reason, therefore, why we should be deprived of our costs, or ordered to pay the plaintiffs' costs: Ponsardin v. Peto (').

North, Q.C., and D. Jones, for the plaintiffs: The judge said that he would have given the appellants their costs if they had not opposed the claim of the plaintiffs in the suit. They did not merely claim their costs, but they claimed a lien for their charges in priority to the plaintiffs' lien. In fact, they refused to allow the right of the plaintiffs to touch the corks without first satisfying their charges. They had

no right to do this.

[JAMES, L.J.: On what authority did the judge give the

plaintiffs a lien on the wine for their costs?

He considered that the question was decided in *Upmann* v. *Elkan* (\*). However, the lien of the plaintiffs is not now under appeal, and the judgment must be taken to be correct on that point. The appellants contested it at the hearing, and were rightly ordered to pay the plaintiffs' costs,

<sup>(1) 33</sup> Beav., 642. (3) Law Rep., 12 Eq., 140; Ibid, 7 Ch., 130; 1 Eng. R., 474.

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and such costs were properly ordered to have priority to their lien.

JAMES, L.J.: I am of opinion that this order cannot be sustained. I do not think it is according to the practice of the court, or what I may call the reasonable justice of the case, that the question whether a party is to be made to pay the costs or not is not to depend upon the facts in the case, or upon the conduct of the parties in the litigation, but upon the mode in which the counsel argue it; or that because counsel claim a little more than they are entitled to, that \*is to be made a ground for making the party they represent pay the costs. If no application had been made to the court below, the wharfingers might well say, "You ought not even to touch the corks till you have paid our charges." Is there anything in the defendants' conduct in the litigation to alter their rights? The defendants in their defence say that they submit to any order which the court should think fit to make "upon their charges and costs being paid." That is merely matter of language. person in this country, when engaged in litigation, must submit to what a court of justice orders him to do. In this case they say, "We will do what you tell us, if you do so The real meaning of that is, "We do not claim anything adversely to the plaintiffs or Pickering. court settle the matter between the parties who are in dis-We have nothing to do with it. We do not raise any objection to the court doing anything as between them it may think right." There is no suggestion in this case that the wharfingers have not acted in a perfectly bona fide manner throughout this transaction, and were not entitled to be paid the charges they made for warehousing this wine. I am of opinion that the wharfingers here had a lien upon the goods in question, and that there was nothing to deprive them as wharfingers of their lien because the corks in these bottles of champagne had fraudulent marks which they knew nothing at all about. I think they have done nothing to deprive themselves of their right to the costs of the action, and this lien for wharfingers' charges must be considered prior to any lien which the plaintiffs may have for costs.

The question whether the plaintiffs are entitled to a lien is not now before us, but it must not be supposed that I assent to the decision in the case that has been referred to, *Upmann* v. *Elkan* ('), where it was held that the plaintiff in such a case had a lien for his costs upon the goods that had been warehoused. That seems to me to be something quite new.

<sup>(1)</sup> Law Rep., 12 Eq., 140; Law Rep., 7 Ch., 130; 1 Eng. R., 474.

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In the present case I am of opinion that the wharfingers ought to have their costs in the suit, and that they are entitled to a prior lien for their warehouse charges. The order of Mr. Justice Fry, therefore, will be varied by omitting the declaration that the plaintiffs have priority with respect to their \*costs of suit over the defendants, the Messrs. Bes- [376 ley, for warehouse charges, and that the plaintiffs pay the defendants Besley's costs in the court below and in this court.

COTTON, L.J.: I am also of opinion that so much of this order as has been referred to by Lord Justice James cannot be sustained. In the first place, Mr. Justice Fry has declared that this claim of the plaintiffs for their costs has priority over a lien which the wharfingers claim for rent and wharfingers' expenses—that is to say, a lien upon the bottles after they have become entirely innocent by the fraudulent corks being removed. That cannot be sustained. The lien of the wharfingers is, I assume, only as against the bottles and wine when the fraudulent corks have been removed, but I cannot see any possible ground, when those have been removed, for saying that their lien for warehouse expenses loses any priority that it before had, and which was a first charge against these goods. It must not be supposed that I assent to the view taken in the case that has been referred to in the course of the argument, where it was held that the plaintiff had a lien for his costs upon the goods; but we cannot decide that question now.

The other question is whether Mr. Justice Fry was right in making the wharfingers pay the plaintiffs' costs. The wharfingers do not make common cause with the wrongdoers, they do not assist them in any way, and when they are made parties to the suit all they say is, "We are ready to act in relation to the cases of champagne in such manner as the court shall direct, subject to the payment of our charges." It has been suggested that the wharfingers ought to lose their costs, because they contended at the bar that the corks ought not to have been removed or interfered with at all till their charges had been provided for. In my opinion that is not sufficient to justify our making an order that they should pay the plaintiffs' costs of the suit. Therefore that part of the order cannot be sustained, and I agree with Lord Justice James that the ordinary order in such cases must be made, that the wharfingers are entitled to the costs of the suit, they having on the pleadings submitted to act as the court should direct.

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\*Thesiger, L.J.: I am of the same same opinion. I think there is no ground for depriving the wharfingers of their costs, or for postponing the lien they had obtained on these goods. I entirely concur with the court in the doubts expressed as to there being any right to give the plaintiffs a lien at all upon these particular goods. It is not necessary to decide that matter in this case, but it certainly seems to me that there ought to be no such lien. I am clearly of opinion that the claim of the plaintiffs in this case ought to be postponed to the right of the wharfingers. The only ground upon which it has been asked that their right should be postponed is that expenses had been incurred by the ac-They did only that which it was tion they had taken. necessary they should do under the circumstances, and they made their submission to the court, and, having done that, it is said that they are not only to lose their lien, but also to be made to pay the costs of this suit. I must own that I can see no ground in principle, and none upon authority, for saying that that is right.

Solicitors: Nicol, Sons & Jones; Arkcoll, Jones & Cockell.

[8 Chancery Division, 877.]

C.J.B., March 11: C.A., May 16, 1878.

# Ex parte Dickin. In re Pollard.

Court of Bankruptcy—Jurisdiction—Debtor to Bankrupt's Estate—"Property"—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 4, 65, 66, 72, 98—Principal and Factor—Principal's Bills accepted by Factor—Bankruptcy of Principal—Sale of Goods by Factor to meet Acceptances—Bankruptcy of Factor before Payment of Acceptances—Right of Principal's Trustee to Proceeds of Sale.

The Court of Bankruptcy, even if it possesses jurisdiction under sect. 72 of the Bankruptcy Act, 1869, to enforce a simple money demand by the trustee of a bankrupt's property against a third party (as to which guære), ought not to exercise the jurisdiction, but ought to leave the demand to be enforced by the trustee in an action in the ordinary way.

Commission agents accepted bills drawn upon them by their principals for part of the value of goods consigned to the agents for sale. After the principals had filed a liquidation petition the agents sold the goods in order to reimburse themselves the 378] amount of one of the bills which they had paid, and \*to provide funds to meet the others which were soon to become due. Before the latter bills were paid the agents filed a liquidation petition. They had spent all the proceeds of the sale. Their creditors agreed to accept a composition, which was paid to the holders of the bills, some of whom claimed to prove in the liquidation of the principals. The principals' trustee applied to a County Court in Bankruptcy for an order that the agents should pay to him the balance of the proceeds of sale, after deducting the amount of the bill which they had paid in full, and the composition which they had paid in respect of the others:

Held, by the Chief Judge (reversing the decision of the County Court Judge), that the trustee was not entitled to the order.

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Held, by the Court of Appeal, that the trustee's demand against the agents was a mere demand for a debt due to the principals' estate, and that the Court of Bankruptcy ought not to assume jurisdiction to try it.

### [8 Chancery Division, 388.]

V.C.M., July 21, 28, 1877. C.A., Dec. 19, 1877: Jan. 23, 1878.

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Г388 Winding-up-Directors-Companies Act, 1862, s. 165-Misapplication of Funds of the Company.

E. agreed with S. that S. should get up a company to purchase and work a colliery which E. had power to sell; that S. should sell to the company for a certain price in cash and shares, and that the balance, after paying preliminary expenses, should be equally divided. S. promoted the formation of a company to purchase the colliery for £25,000 in cash and £25,000 in paid-up shares, and induced six gentlemen to become directors, engaging that they should be at no expense. The articles contained a clause empowering, but not binding, the directors to pay the preliminary expenses attending the formation of the company. Shortly before the company was registered an agreement was made between S. and the directors that S. should receive £3,500 for preliminary expenses. On this occasion he produced a list of preliminary expenses, but did not produce vouchers, and no inquiry was made of him as to whether he was entitled to receive anything under his arrangements with E. S. received £3,200 from E., and received out of the funds of the company the £3,500, out of which he paid the calls on the shares which the directors had taken to qualify

them for the office. The company having been ordered to be wound up:

Held, by Malins, V.C., that the directors were jointly and severally liable to repay to the company the sum so ordered to be paid to S. for preliminary expenses, on the ground that the money was paid in order to provide the directors'

qualifications.

Held, on appeal, that this decision must be affirmed, for that the directors had by their agreement with S. disqualified themselves for exercising a discretion as to the payment of preliminary expenses, and had not used due care and caution in examining into the propriety of paying them, and that, irrespective of the fact of their calls having been paid out of the money received by S., the payment to him was, under the circumstances, a misapplication of the funds of the company, for which they were liable under the Companies Act, 1862, s. 165.

This was an adjourned summons on which the court was asked on behalf of the official liquidator of the Englefield Colliery Company, Limited, to declare that the directors of the company, Lord Richard Browne, Mr. Campbell, Lieutenant-Colonel Hamilton, Mr. Albert Pelly, Mr. Sapte, and Mr. Wingrove, were jointly and severally liable to repay to the company the sum of £3,500 which they had paid to Mr. Sheridan, the promoter of the company, for preliminary expenses, and which was retained or applied by him for purposes other than preliminary expenses properly payable; and also that the directors might be ordered to pay [389] the amount of the shares held by them as their qualification for the office. Pending the proceedings Lord R. Browne paid £500 by way of compromise of the demand for £3,500,

25 Eng. Rep.

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and the summons was amended by omitting his name and

reducing the £3,500 claimed to £3,000.

The company was registered on the 19th of March, 1873, as a limited company, for the purpose of purchasing and working the Englefield Colliery, under a memorandum and articles dated the 15th of March, 1873, with a capital of £100,000 in 10,000 shares of £10 each, of which 2,500 were to be issued as fully paid up; and it was formed under the

following circumstances:

In 1872 a person named Edwards entered into an arrangement with Jones, the owner of the colliery, that Edwards should get up a company to purchase it, that Jones should receive £4,500 in cash and £11,000 in paid-up shares, and that Edwards should have whatever else he could make out of the transaction. Edwards in 1873 entered into an arrangement with Sheridan that Sheridan should get up a company to purchase the colliery for £25,000 in cash and £25,000 in fully paid-up shares, that Sheridan should pay all expenses up to allotment, and that the surplus should be equally divided between him and Edwards.

Sheridan accordingly took steps to start the company, and obtained the consent of the above named persons to act as directors. It appeared that in each case he undertook that the director should be at no expense. A contract was entered into on the 14th of March, 1873, by Jones and Edwards with a trustee for the intended company for the sale of the colliery to the company for £25,000 in cash and £25,000 in paid-up shares, to be paid as follows: £12,500 in cash within fourteen days after the allotment of the shares in the company, and the remaining £12,500 in cash and £25,000 shares within six weeks after the allotment of the shares. This contract was adopted by the articles of association, and the above named directors were named in the articles as the first directors, along with another gentleman, who immediately resigned and need not be further noticed.

By clause 81 of the articles it was provided that the directors might, without any further power or authority from the members, immediately on the incorporation of the com-390] pany, and notwithstanding \*that the nominal capital might have been only partially subscribed for, commence business and do the things therein mentioned in the name and behalf of the company: (a) "They may and are hereby authorized and empowered to pay and reimburse themselves out of the capital of the company or any other moneys of the company in their hands, all printing, legal, and other expenses whatsoever incurred in the formation of the com-

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pany; also they may pay brokers and others a commission for raising the capital or placing the shares of the company."

The qualification of a director was the holding fifty shares.

It appeared that before the company had been registered an arrangement had been made between the proposed directors and Sheridan, that upon allotment £3,500 should be paid to him, as expressed in a letter of the 13th of March, 1873, from him to the chairman, "for my risk and outlay in this matter as preliminary expenses." On the 18th of March he wrote a letter to the chairman, undertaking that in the event of there being no allotment of the shares of the company he would defray all the expenses in connection with the formation of the company and hold the directors harmless in respect of the same. There was no entry of these arrangements in any of the books of the company.

The first meeting of the directors was held on the 9th of April, 1873, at which it was reported that 1,563 shares had been applied for, and the deposit of £1 per share paid, except on 300 of them. At this meeting the six directors proceeded to allot the shares applied for, including fifty shares to each of themselves. These directors' shares were the shares on which no deposit had been paid. Pelly paid his deposit on the 5th of May, but nothing was paid on any

other of these 300 shares till June.

At a board meeting on the 5th of May, 1873, it was resolved that a check for £1,200 should be drawn in favor of Sheridan on account of preliminary expenses, and such check was drawn and paid at the beginning of June, immediately after which the sums payable on allotment were paid in respect of the shares of several of the directors. On the 11th of July, 1873, another board meeting was held, at which a further check for £800 was drawn in favor of Sheridan for preliminary expenses, and £600 of this was traced as having been applied in payment of £2 per \*share which had [39] become due from the directors for a call on their shares. At a board meeting held on the 23d of July, 1873, a call of £2 per share was made payable on the 26th of August. The directors paid nothing in respect of it till after a meeting on the 1st of October, when a further sum of £600 was ordered to be paid to Sheridan for preliminary expenses, and certain sums for remuneration to the directors, and at different times after this the £2 per share on the directors' shares was paid. On the 29th of October, 1873, a further sum of £600 was ordered to be paid to Sheridan, and a further call of £2 per share was made. This call was paid on the shares of five of the directors on the day on which the check for Sheridan's £600 was cashed. Mr. Sapte's call was paid some days later. On the 21st of January, 1874, a final call of £1 per share was made payable on the 19th of February. On the 4th of March Sheridan received a check for £300, the balance of the £3,500. On the 1st of April six checks were drawn for directors' fees for sums amounting together to £350, and on subsequent days in April the final call of £1

on the directors' shares was paid.

Sheridan deposed that the preliminary expenses paid by him considerably exceeded the £3,500 which he received. He stated in his examination that he had paid out of the moneys so received by him the moneys requisite to pay up the shares taken by the directors, except as regarded Sapte, who had paid £150. It appeared that at the discussions relating to the amount to be allowed to Sheridan for preliminary expenses he had produced a list of items of expenditure, including a fee of £1,000 to the brokers of the company for allowing their names to appear on the prospectus; about £1,700 for the estimated costs of advertising and printing the prospectus and circulars; about £200 for law charges and registration; and about £500 for office rent and clerk's salary up to the formation of the company. Vouchers were not produced, but Sheridan produced letters from the tradesmen employed, stating that they had no claim against the company. It did not appear that any inquiry was made of Sheridan as to whether he would be entitled to receive anything in respect of the formation of the company under his arrangements with Edwards.

392] \*Edwards, who was examined on behalf of the official liquidator, deposed that the cash payment to be made by the company was altered from £25,000 to £8,500, and the share payment increased to £41,500. That he had received the £8,500, out of which he had paid to Sheridan, or by his direction, £3,250, and that he had not settled accounts with Sheridan, but considered that he did not owe

him anything more.

On the 12th of February, 1875, an order was made for winding up the company on the application of a creditor.

It appeared that Sheridan had promised to give Wingrove £500 if he could induce Lord Richard Browne to become a director and chairman of the company. Wingrove had applied to Lord Richard Browne and persuaded him to take those offices, and alleged that he had thus a legal demand against Sheridan, and that Sheridan had paid the £500 on Wingrove's shares in satisfaction of that demand.

The official liquidator, on the 25th of October, 1876, took

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out a summons to the effect stated above. Lord Richard Browne, by way of compromise, paid £500 in satisfaction of his liability, with the sanction of the judge, and the summons being amended, as above stated, was brought on against the other five directors.

The summons was heard before Vice-Chancellor Malins

on the 21st and 28th of July, 1877.

Higgins, Q.C., and Beale, for the official liquidator: was first settled in the case of In re Disderi & Co. (1) that it was not lawful for directors to have their qualification shares paid for them by the promoter out of the funds of the company. That case has been followed by several others, and there is no doubt that these directors are liable to repay the sums they so received. The money was paid to Sheridan nominally for preliminary expenses, but it has been traced into the hands of the directors, who made no payment upon their shares until they received the amount from Sheridan. It is proved that the directors knew where the money came from, and as directors they cannot plead ignorance of the transaction. They were in the position of trustees for the company, and they cannot be allowed to make a profit out of a \*transaction which, as such [393] trustees, they ought to have prevented. This was laid down in Ex parte Larking (\*), and the same principle was acted upon in Madrid Bank v. Pelly (\*) and has been the guiding rule in many other cases, including the Brighton Brewery Company (\*).

Whitehorne, for Wingrove: It is shown that the £3,500 was paid to Sheridan for preliminary expenses in forming and promoting the company. If so, why should he not have been at liberty to pay for the qualification of the directors, if he thought such a payment desirable. It was, in fact, his own money, and not the company's, and he could do as he liked with it. As to the payment to Wingrove, there was a bona fide debt due to him by Sheridan for introducing Lord Richard Browne to act as chairman. That was the consideration for the payment. Under any circumstances there is no joint and several liability on these directors. In the Madrid Bank v. Pelly each of the directors was made liable for the sum he had received, and this was

also the case of In re Brighton Brewery Company.

A. Young, for Sapte: Mr. Sapte did not receive the whole amount, £500, for his shares. He himself paid £150, and is willing to pay the rest if he has time allowed him, but there

<sup>(1)</sup> Law Rep., 11 Eq., 242. (2) 4 Ch. D., 566; 20 Eng R., 762.

<sup>(\*)</sup> Law Rep., 7 Eq., 442. (4) 37 L. J. (Ch.), 278.

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is no ground for declaring a joint and several liability against the directors.

Crossley, for Campbell: There was a bona fide agreement by the company to pay Sheridan the £3,500 for a good consideration, which they have had the benefit of; and he having paid the directors with what was in fact his own money, we ought not to be called upon to pay over again the money for our shares. If the official liquidator cannot get the money from Sheridan, he cannot get it from the directors.

Higgins, in reply as to joint and several liability, cited 394] De \*Ruvigne's Case(') and London and Provincial Starch Company, before Vice-Chancellor James, April 22, 1869.

Malins, V.C.: This is a very remarkable case. The company was registered on the 19th of March, 1873, with a capital of £100,000, in 10,000 shares of £10 each. If the colliery purchased by the company had been properly managed there is nothing to show that it would not have produced good results, and I see no reason to suppose it was not a bona But it was attempted to be carried into effect *fide* concern. This is one of the many inin a most improper manner. stances which have lately come before the court in which persons have proceeded to work out a project with too small The company was advertised with a capital of a capital. £100,000, holding out therefore to the public that it would require that amount of capital to work it, instead of which they commence their operations when they had less than a sixth of their capital subscribed for. It is said that there were fraudulent proceedings at the outset in purchasing the colliery at one price and selling it to the company at a much larger price; but with that I am not concerned upon the present application. The company having been formed, the first meeting took place on the 9th of April, 1873, and at that meeting the secretary reported that applications had been made for 1,563 shares, including 300 for the six directors of the company, which 300 were not acompanied with deposits at that time; therefore the 300 shares were not paid for, and the whole amount subscribed for amounted to less than a sixth of the whole capital. If directors will go on attempting to carry out with £15,000 that which they have said could not be worked without £100,000, no wonder they get into trouble. Such conduct is an entire neglect of their duty. meeting in April the directors ought to have said, We cannot go on without more capital, and they should have returned to the shareholders all the deposits which had been

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paid: instead of which they have had recourse to a practice which it is to be hoped they will remember as long as they live. It seems to have been arranged between the company and Sheridan that the latter was to have 31 per cent. upon the amount of \*capital; but what can be said of the [395] conduct of directors who, finding they had only 1,563 shares taken up, would pay to the promoter the whole sum of £3,500 for preliminary expenses, which was to be the amount paid upon the whole capital of the company? The cause of their conduct is evident: all these directors had sat at the board. and they all knew it was impossible for them to escape their liability to pay £500 each for the fifty shares they were bound to hold as a qualification. Every one of them having incurred that liability, their scheme was to escape from the liability by making the funds of the company pay the money. Then they resolved that out of the funds they had in hand they would pay Mr. Sheridan £3,500 for what they call preliminary expenses, and with this money of the shareholders Sheridan was to pay what was required for the shares necessary for their qualification. Is that scheme consistent with honesty? Was it not paying the qualification of the directors out of the money of the shareholders? Sheridan says, "It is true that I had an arrangement with Sapte that he was not to pay the money for his qualification, and that I had an arrangement with Campbell to the same effect, but Campbell had no legal claim on me. It is true that I did qualify Campbell, and to do this I procured the money from the company by way of preliminary expenses. I qualified the directors, and they knew where the money came from." None of these directors have denied that they received their qualification from Sheridan, except Campbell, who has appeared by his counsel, Mr. Crossley, who has argued upon the allegation that Campbell paid the money himself; but Campbell, in his affidavit, has stated that Sheridan promised it should cost him nothing, and it did cost him nothing. He understood that Sheridan would pay his qualification, and he believed that Sheridan considered himself in Campbell's debt in respect of some previous transac-He then says that Sheridan paid him before he paid his calls upon the shares.

Now, what is the position of these gentlemen? It was their duty as trustees to take care of the money and to protect the interests of the shareholders, instead of which they entered into this discreditable arrangement with Sheridan. Not one of them ever paid a penny. After having paid the

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money to Sheridan by way of preliminary expenses, it is 396] paid back to them to relieve \*them from their liability.

Under such circumstances, what is the law?

In De Ruvigne's Case ('), Lord Justice James said, "The appellant allows himself to become the paid agent of Hunt for the purpose of assisting him in his transactions with the company. Hunt said to this gentleman, 'I will name you and qualify you as a director. You shall be on the board as my nominee. I will give you your qualification, and the first thing you have to do is to carry out that agreement with me.'" And his Lordship added, "It is impossible to say that the thing is not as gross misconduct as any man in the position of a director could be guilty of."

That case is exactly the same as Hay's Case (\*), which was decided under the 165th section of the Companies Act, 1862. There checks were drawn by the directors on the bankers of the company, and given to the vendors in payment of the purchase-money, and one of the checks found its way into Sir J. Hay's bankers, and Sir J. Hay gave a check for the same amount to the company in payment for his shares.

Then there is one of the last cases decided, that of In re Eupion Gas Company (before myself on the 17th of March, 1877, and afterwards by the Court of Appeal on the 9th of June, 1877), where Aspinall was the holder of shares the money for which had been paid, but it was money borrowed of a banker, which was to be paid back again. It was a mere trick; so here the shareholders paid the money, and the directors got that money and paid it to Sheridan, who repaid it to them. The payment by way of preliminary expenses was merely colorable. It is a clear misfeasance on the part of the directors, and a gross breach of trust by them, and those who are guilty of such conduct are answerable jointly and severally to repay the money. They are all liable for the whole amount of £3,500.

It appears that one of the directors, Lord Richard Browne, has paid a composition of £500 in respect of his liability, and I should be glad if the other gentlemen would make some offer which could be accepted by the official liquidator; but all I can do is to decide, upon the grounds I have stated, that all of them are jointly and severally liable for the whole 397] sum of £3,000, with interest at £5 \*per cent. on the £3,500, from the days of the payment of the checks to Sheridan. As to the costs, they must all be jointly and severally liable to pay the costs in chambers, and upon this application. They will have fourteen days for the payment.

<sup>(1) 5</sup> Ch. D., 306, 322; 22 Eng. R., 107. (2) Law Rep., 10 Ch., 593; 14 Eng. R., 809.

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Wingrove appealed. The appeal was heard on the 19th

of December, 1877, and the 23d of January, 1878.

Whitehorne, for Wingrove: Elliott v. Richardson (') is distinguishable. The preliminary expenses were a real debt from the company to Sheridan. The company would have had to pay the preliminary expenses if Sheridan had not paid them.

[James, L.J.: How do you make out that the company

were liable to the preliminary expenses?

The company had adopted them: Bagnall v. Carlton (\*). Article 81 empowered the directors to pay preliminary expenses.

[JAMES, L.J.: No, only to repay what they had paid themselves. Here the promoters had paid themselves in a

different way.]

Pearson's Case (\*) is distinguishable. There, there was no binding debt. Here, there was a good debt. The money was Sheridan's own, and he was at liberty to pay the directors' calls if he thought fit.

Higgins, Q.C., and Beale, for the liquidator, were not

called on.

JESSEL, M.R.: As I intimated during the course of the argument, I cannot agree with the Vice-Chancellor, in so far as he charges Wingrove and his co-directors with fraud, and makes them liable on that ground to pay the £3,000. It does not appear to me that they were guilty of any fraud, and if I may give an opinion which is \*not flattering to their [398 intellectual faculties, I think that they were rather deceived than deceivers. We have to deal, however, not with the judgment of the Vice-Chancellor, but with his decision. The question is, whether the order which he has made can be supported independently of the reasons which he has given for it, and I am of opinion that it can; for I think that the directors are under a liability to repay which is quite independent of the amount paid on their shares, and of the question whether directors qualified by Sheridan were liable to pay up their shares in full. The question is, whether under the terms of sect. 165 of the Companies Act, 1862, Wingrove and his co-directors have misapplied and become liable or accountable for any moneys of the company. Now, in the first place, it is proved that Edwards, who had become entitled to sell this colliery, made an arrangement with Sheridan that if Sheridan could get up a company to purchase it for £50,000, and would pay the expenses out of his own

<sup>(\*)</sup> Law Rep., 5 C. P., 744. (\*) 6 Ch. D., 371; 23 Eng. Rep., 1. 25 Eng. Rep., 47

(\*) 4 Ch. D., 222; 5 Ch. D., 336; 22 Eng. R., 127.

pocket, Edwards would sell to the company for £50,000, half in cash and half in shares, and would divide the profit equally between himself and Sheridan. It also appears that Sheridan in fact got up the company by procuring some gentlemen to become directors of it on the terms of their not paying for their shares, and all the six gentlemen who became directors took their shares without ever paying for This also is to be noticed, that when those gentlemen entered into the bargain to pay the £3,500 to Sheridan they were not legally directors of the company, though they had agreed to become directors. Mr. Wingrove has raised a question peculiar to himself which, for the purpose of the present appeal, it is not necessary to decide. He contends that though he did not himself pay a shilling for his shares he was entitled to consider the £500 paid by Sheridan as not a voluntary payment, but as the payment of a legal debt due in respect of services rendered by him in inducing Lord Richard Browne to become chairman of the board of directors of the company. In the present state of the evidence I cannot help thinking that if I had to decide the point I should decide that the £500 was not a legal debt. disposed to think that if a man is promised £500 if he can induce a person to become a director, and goes to that person suppressing \*the fact of the promise, the transaction is an immoral transaction, and the person who was to receive the bribe could not maintain an action for it. should not, however, be willing to decide this question without further inquiry into the facts, and for the present purpose I will take it that there was a legal debt of £500 due from Sheridan to Wingrove, which I am willing to believe Wingrove understood to be the case. But what was the bargain with Sheridan? Sheridan was the promoter of the company, and known to be so, and I cannot believe that any men of business dealing with him could suppose that he was incurring trouble and expense without a view to making a profit out of the transaction; and no source is suggested from which a profit could come except the funds of the company.

On the 13th of March, 1873, Sheridan writes a letter to the board, saying, "It is I believe understood and agreed between the board and myself, that the sum of £3,500 is to be paid to me upon allotment for my risk and outlay in this matter, as preliminary expenses." That is what is commonly called promotion money. On the 18th he writes to the chairman: "In the event of there being no allotment of the shares of the Englefield Colliery Company, Limited, I

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hereby undertake to defray all the expenses in connection with the formation of the company, and to hold the directors harmless in respect of the same." Therefore, at the time of the formation of the company, these gentlemen had agreed to pay Sheridan promotion money out of the funds. In this state of circumstances Wingrove says that £3,500 was paid to Sheridan for preliminary expenses, for which it was believed that the company was liable, but I am satisfied that there was no real investigation of the amount of the The first item mentioned is a fee of £1,000 to the brokers for allowing their names to be used, which might be a useful expense, but not an expense incident to the formation of the company. The first duty of Wingrove and his co-directors was to ask for details of the expenditure, and see what Sheridan was getting. The 81st clause of the articles provides that the directors may "pay and reimburse themselves out of the capital" of the company, or any other moneys of the company in their hands, all printing, legal, and other expenses whatsoever, incurred in the formation of the company; also they may pay \*brokers and others [400] a commission for raising the capital or placing the shares of the company." There is here no power to pay Sheridan, the words evidently refer to paying the persons who have If Sheridan paid those persons, the direcdone the work. tors might repay him, but it was their duty before doing so to ask him what he had received or was going to receive for promotion of the company from any other quarter, and to take care not to let him be paid twice over. But in fact they did pay him twice over without making proper inquiry. They had placed themselves in such a position towards him that they could not ask him the question. They had bound themselves hand and foot by agreeing to pay him this sum, so that they could not exercise the discretionary power conferred upon them by clause 81, and the transaction cannot be represented as an honest bona fide exercise of that discre-The directors availed themselves of a power which was emphatically a discretionary one, and made it a means of giving away the property of the company. The company was formed in March; in May the directors vote £1,200 to Sheridan on account of preliminary expenses, and he applies it in paying calls on the directors' shares, and, taking the matter in the way most favorable to Wingrove, the directors who had taken shares were never called upon to pay, but wanted to get the money in this way.

I am always extremely unwilling to press technical points against honest trustees who are fairly performing their duty,

C.A.

or who believe they are fairly performing their duty, but I confine this observation purposely to the case of conscientiously honest trustees who are anxious to do their duty, and I cannot extend it to the case of gentlemen who enter into this kind of preliminary agreement from which, whether legal or not, they could not withdraw, and who shut their eyes to the fact that Sheridan was making a large profit out of the transaction. It appears to me that neither legally not substantially—I do not like to say morally—was this power fairly or properly exercised. Consequently the money of the company has in fact been misapplied and the order of the Vice-Chancellor ought not to be disturbed. gard to costs, Mr. Wingrove has obtained by this appeal a very considerable advantage with regard to his reputation and position, but as the decision of the Vice-Chancellor has 4011 not been altered, this will \*not exempt him from the payment of the costs, which ought to follow the result.

BAGGALLAY, L.J.: These five directors have been ordered jointly and severally to repay £3,500, with interest, less £500, which has been repaid by their co-director. of £3,500 was mainly expended in paying the calls on the shares of the directors, the payments being made at different times between the 5th of May, 1873, and the 4th of March, 1874, and being made by Sheridan out of sums received by him from the funds of the company, by order of the directors. It is not pretended that on any occasion when the directors ordered a payment to Sheridan any accounts were laid before them, but the payments were made pursuant to an agreement entered into between the board and Sheridan on a day before the day on which the company was formed. An agreement was then come to with him to pay him £3,500 for preliminary expenses. I cannot shut my eyes to the fact that the directors were nominees of Sheridan, and that he had agreed to indemnify them from all liability in respect of their shares. All of them, therefore, had an interest in adopting the views of Sheridan, and were not in a position to exercise an independent judgment. It is not pretended that the tradesmen's accounts were produced, but he produced a list in which he had entered the sums due to them at certain amounts. No vouchers were required, and the resolution was for payment, not on production of vouchers, but merely on production of letters from the tradesmen, stating that they did not hold the company liable. Payments made on the footing of an agreement of this kind, without investigation, were improper. It would, in my view, have made no difference if there had been no agreement by Sheridan to pay upon the shares taken by the directors. They would still have been under an incapacity to exercise an independent judgment in voting to him this sum of money. I am, however, satisfied that these payments were ordered for the purpose of enabling him to pay the calls on the shares. I am of opinion that the order of the Vice-Chancellor must be affirmed; but I agree with the Master of the Rolls in saying that no case of

fraud is made out against the appellant.

\*Thesiger, L.J.: I agree that the order of the [402 Vice-Chancellor ought to be affirmed. I do not see that the directors did anything which can be described as being a gross fraud, or as being a fraud at all. But under the act it is not necessary that we should come to the conclusion that there has been fraud. Sect. 165 does not merely apply to transactions calling for moral censure, it applies equally to a misfeasance not calling for such censure. Under the term "misapplication" we need only find two elements; that moneys of the company have been applied as they ought not, and that the directors have done this without exercising a fair discretion as to the propriety of the application. What are the facts? Edwards, in substance, had agreed to purchase the colliery for £4,500 in cash and £11,000 in In February, 1873, Edwards and Sheridan agreed to form a company to purchase the colliery for £50,000, half in cash and half in shares. Edwards in his evidence says: "I agreed with Sheridan that he was to get up the company and that I should sell to the company for £25,000 in cash and £25,000 in paid-up shares, and that as between him and myself he was to pay all expenses up to allotment, and that we would equally divide the surplus." The cash payment was afterwards reduced to £8,500 and the share payment increased to £41,500. Edwards received the £8,500 and paid to Sheridan or by his direction £3,250. Sheridan therefore was repaid his preliminary expenses, and this was not a case in which the directors ought to have exercised the discretion given them by article 81, to pay these expenses. In paying Sheridan this £3,500, which certainly was an improper payment, the directors did not use ordinary care and caution. I agree that they are not to be charged with moral fraud, but we must observe the position in which they stood with Their interests were in some respects respect to Sheridan. identical with his and antagonistic to those of the company, therefore proof of care and caution on their part is requisite. These gentlemen had agreed beforehand to pay him £3,500 for preliminary expenses. It does not appear to me that

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such an agreement would by itself bring the directors within sect. 165, but when it is coupled with the payment by Sheridan of the calls on their shares, it is a very strong circum-403] stance. No inquiry was made of Sheridan as \*to the profit he was making by the transaction, and we find that the payments made to him coincide in point of time with payments made by him for the benefit of the directors.

I think, therefore, that there was a misapplication of the funds of the company for which the directors were liable.

Solicitor for the liquidator: F. C. Mathews.
Solicitors for the directors: Carr, Bannister, Davidson & Morriss; Oehme & Summerhays; Kendall & Congreve.

See 23 Eng. R., 642 note.

Several persons signed articles of association, fixed the amount of the capital stock, chose officers, and issued certificates of stock, intending to form a corporation under the St. of 1866, ch. 290, but the association failed to become a corporation. Some of the members of the association subscribed for stock and received certificates therefor, and others did not subscribe. and B., two of the subscribers, who had been chosen president, and treasurer respectively, took possession of real estate authorized to be purchased by a vote of the association, and carried on the business intended to be carried on by the corporation when formed, as agents

of the proposed corporation; borrowing money on their own notes and putting it into the business, with the knowledge of the other members, buying goods from the other subscribers and from persons who had not subscribed, and intending to turn over the business to the corporation upon its organization. Held, on a bill in equity by A. and B. against all the other subscribers, as partners, for a settlement of the alleged partnership affairs, that neither the defendants who had subscribed to the stock of the proposed corporation, nor those who had not subscribed, were partners with A. and B.: Ward e. Brigham, 127 Mass., 24.

[8 Chancery Division, 404.]
M.R., Feb. 14, 1878.

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\*JEWITT V. ECKHARDT.

[1877 J. 144.]

Copyright—Design—Agreement for Sale—Exclusive Right to sell Manufactured Articles—Registration—Proprietor—Assignment or License not in Writing—5 & 6 Vict. c. 100, s. 6.

A partial assignment of, or license to use, a design under sect. 6 of the act 5 & 6 Vict. c. 100, must be in writing, and can only be made by a registered proprietor. By a verbal contract made in July, 1877. C., an American manufacturer, purported to sell to the plaintiff the exclusive right to sell in England an article newly designed and then about to be manufactured, and also to obtain such protection for the same as he could do under English law, it being stipulated that the plaintiff should obtain the article exclusively from C.: by the same contract C. agreed to sell to the plaintiff the first twenty cases of the article for the price agreed upon, which was to cover both the right and the goods. In September, 1877, the cases were delivered in England to the plaintiff, who paid the money due under the contract. Meanwhile, in August, 1877, the plaintiff had obtained registration of the design under 5 & 6 Vict. c. 100,

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and the copyright therein was granted to him for the term of three years. In an action to restrain the alleged infringement by the defendant of the plaintiff's copyright:

Held, on the evidence, that the plaintiff had not acquired under the contract the right to apply the design to a manufactured article, so as to entitle him to register it in his own name under the act:

Held, also, that the plaintiff's right (if any) to protection could not have accrued

till the completion of the purchase.

THE plaintiff in this case, who carried on business as an importer of toys and other articles from America, sought to restrain an alleged infringement by the defendant of the plaintiff's copyright in a design of which the plaintiff claimed to be the registered proprietor, as being a new and original design within the meaning of the Designs Copyright Act, 5 & 6 Vict. c. 100.

The defendant also carried on a business similar to the

plaintiff's as an importer of toys from America.

In July, 1877, Mr. Crandall, a manufacturer of toys in the United States of America, was in communication with W. W. Rose, the plaintiff's agent at New York, with respect to a new toy called the "Schoolmaster and Desk" which Crandall then had in preparation. The negotiations were subsequently carried on in \*New York between Cran- [405] dall's agents at that place and Rose, and it was ultimately agreed that the plaintiff should purchase from Crandall the first case of toys manufactured according to the then un-published design, and also the right in England to the design itself for the sum of money then agreed upon. dall agreed that the plaintiff should take every means in his power to protect the right so sold to him, and also that he (Crandall) would not supply any toys of that design for this country except to the plaintiff, and it was, on the plaintiff's behalf, agreed that he would not manufacture the toys, but purchase all he required from Crandall. There was no agreement in writing between the parties.

Soon afterwards Crandall forwarded the first case of toys made by him to Rose, to forward to England, to enable the plaintiff to protect the design. Accordingly, on the 7th of August, 1877, the plaintiff obtained registration under the act 5 & 6 Vict. c. 100, and a copyright in the same was granted to him for the term of three years. In September, 1877, the plaintiff received the case of toys, and paid to Crandall the

sum agreed upon.

Subsequently to the registration by the plaintiff and the receipt of the first consignment, the defendant, who carried on business as an importer of toys from America, sold toys in England which were admitted to be of the same design as those sold by the plaintiff. These toys were obtained by

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the defendant from Crandall, but it was alleged by the plaintiff that in thus supplying them, Crandall was not aware that they were destined for sale in England.

The plaintiff thereupon brought his action, alleging that the defendant had knowingly and wrongfully sold the toys in infringement of the plaintiff's copyright, and claiming an injunction to restrain the defendant from selling the toys or

infringing the plaintiff's copyright.

The defendant, by his statement of defence, denied that the plaintiff had a copyright in the design, which he alleged had been published before, and he further alleged that the toys sold by him (the defendant) had been purchased from Crandall in the ordinary way of business, and that he had the same right to resell them as the plaintiff.

406] \*The plaintiff, on the other hand, alleged that, though the defendant had obtained the toys from Crandall, the latter was not aware that they were intended for sale in

England.

W. W. Rose stated in his evidence before the court that the arrangement made by him on Jewitt's behalf with Crandall was that he (Rose) was to have one of the copies of the toy called "Schoolmaster and Desk," designed and manufactured by Crandall, but not quite complete, to send to the plaintiff for the purpose of obtaining such protection for it as he might under English law, and the whole matter was to be kept perfectly secret till such time as Jewitt could do so. It was at the same time arranged that, when the goods were manufactured and ready for delivery, he (Rose) was to purchase the first twenty cases, and that for these and the right to register the design he was to pay Crandall; that it was further agreed that he was to have as many more of the goods as he could sell, and that Crandall was not to supply them to any other person for export to England; that he understood, as part of the consideration, that the plaintiff should use every reasonable effort to extend the sale in England, and should not sell toys bought of any one else; that the goods were delivered on the 8th of September, 1877, and that he (Rose) paid for the whole 660 dollars. He further stated that the design and goods were not separated in the agreement, but bought and paid for together, and that he bought the right to register the design so as to obtain the exclusive use of it in this country.

Davey, Q.C., and Chadwyck Healey, for the plaintiff: The plaintiff, under the contract, obtained from Crandall for valuable consideration a new and original design within the meaning of sect. 5 of 5 & 6 Vict. c. 100. He was there-

fore entitled to register the same as his own copyright. It is true that there was no actual assignment in writing, but we contend that an assignment is only required by the act to be in writing after the design has been actually registered. A copyright in a design differs from that in a book, in the latter case an assignment before registration must be in writing: Layland v. Stewart('). This is not necessary in the present case, for the copyright only arises from the \*registration. Even assuming that the plaintiff was [407 a mere licensee, he would still be entitled to protection under sect. 5 of the act. It is not disputed that if the plaintiff is entitled to copyright he is entitled to succeed in the action.

Aston, Q.C., and Methold, for the defendant: The plaintiff is not entitled to the copyright in this design. Under the contract with Crandall there was no separate consideration in respect of the design, as it was included in the lump sum paid for the articles purchased. An assignment of a right to be registered, whether under the act or otherwise,

must be in writing.

JESSEL, M.R.: I am not satisfied on the evidence that Crandall ever sold or that the plaintiff ever bought the de-

sign; but I am going to decide also on another point.

As I understand Mr. Rose's evidence (and I am assuming now that Jewitt authorized Rose to act as his agent), what was really sold was this: the exclusive right to Jewitt to sell Crandall's toy in Europe, and the right to take such means, by patent or registration, as would secure that exclusive right. In my opinion, that does not include the right to register in Jewitt's own name, because a registration in Crandall's name would have effected the whole of the security contemplated. He is a person who did not know the law of England, and he did not intend to do more than secure the right of selling those toys manufactured by Crandall. I do not think that is a right of design at all, because, when you consider what the right to a design is, it is a statutory right, and the sole right to apply the design. The statute 5 & 6 Vict. c. 100, s. 3, provides, "That the proprietor of every such design, not previously published, either within the United Kingdom of Great Britain and Ireland, or elsewhere, shall have the sole right to apply the same to any articles of manufacture or to any such substances, as aforesaid."

Now, in my opinion, Jewitt never had the right to apply the design to any article manufactured. It is expressly stated that Crandall was to retain the right to manufacture

<sup>(1) 4</sup> Ch. D., 419; 20 Eng. R., 652.

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I cannot find in this act of Parliament any the articles. other right. There is \*a limitation of the right, for he is only to have that right to apply it for a certain period, and if it is registered; but the thing which is protected is the right to apply the design to the articles so manufactured. As I said before, I think Crandall kept it, and therefore in no sense and in no way did Jewitt become the proprietor of

the design.

Now, what else could be claim? It is said that under the 3d section he may acquire "the right to apply the same" to ornamenting any one or more articles of manufacture. That is all he has to acquire—"the right to apply the same." The words of the 5th section are the same. Then it goes on, "and also every person upon whom the property in such design or such right to the application thereof shall devolve." That is the same thing. The only right dealt with by the act is the right to apply the design. It appears to me, in order for a man to be a proprietor within the act, he must have some right, either general or limited, to apply Therefore I hold that Jewitt is not a proprietor at all, either of the entire right, or of a limited right.

Now, I want to deal with another question raised in argument, which, although perhaps it is not necessary for me to decide, I wish to deal with, and give my opinion on, for what it is worth as to the law, and that is with regard to a verbal contract in fleri. The facts seem to be these.

An arrangement made in July—I will assume now that Crandall and Jewitt were the parties—if they dealt by their respective agents they were the parties—to sell a right to apply the design for a limited space in Europe, as is alleged to be the case here, and a parcel of goods to which the design was to be applied at a future day, that is, to be delivered and to be paid for on delivery. The delivery takes ered and to be paid for on delivery. place in September. I hold that before September nothing passed. It is quite plain that it was inchoate until September, and until the delivery of the goods there was no complete bargain. Mr. Jewitt, as Mr. Rose told us-and I must say he gave his evidence in a very candid and satisfactory manner—did not agree to buy one as separate and distinct from the other, but bought both right and goods together. He would not have paid his 660 dollars if he had got no goods, and therefore, until the goods were delivered, there 409] was nothing to pass \*the right to the design to Jewitt; and it seems to me that in no way by this verbal contract, even supposing a verbal contract would do, did anything pass to Jewitt at all, supposing I was wrong, which

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I do not think I am, as to the meaning of a design. I think, therefore, on this ground also Jewitt fails.

Now I come to another question, and I must say that the point is not as clear upon the act of Parliament as I could wish. This act of Parliament requires the assignment of a copyright in a design to be in writing. We must recollect that this right is a statutory right, it is created by this statute. Of course the statute which creates it may also point out how it is to be assigned or dealt with. It seems to me, on the fair construction of the act of Parliament, although I admit it is very obscure—and, as I have often said in these matters with regard to these obscure instruments, whether they are acts of Parliament or wills, opinions may differ—

that the assignment or license must be in writing.

My reason for saying so is, that when you come to look at the framing of the act of Parliament it stand in this way: the 3d section provides that the proprietor of a design shall have the sole right to apply the same to any articles of manufacture for a certain term of years. Then when you come to the 5th section it makes the proprietor who is to have this sole right not merely a sole proprietor but a limited proprietor, including, as I read it, a license. The words are: "Every person acquiring for a good or a valuable consideration a new and original design, or the right to apply the same," which is the same thing for the purpose of the act of Parliament, "to any one or more of the articles registered, or any one or more substances"—you can divide it in that way, and can give a right to apply it to certain articles and not to others—"every person upon whom the property in such design or such right to the application thereof shall devolve"—it may devolve on an executor, and so on— "shall be considered the proprietor of the design." fore a licensee does acquire the right to a design as well as an assignee, so that a partial assignee or a total assignee, or any person upon whom the right may devolve, whether executor or administrator, is also within the act. gives the person the right not as proprietor according to the 3d section, but to the extent to which his right may have been acquired, but \*not otherwise. It is a kind of [410] supplement to or interpretation of the 3d section. He shall have the sole limited right, or the limited sole right. not absolutely exclusive, but only to the extent of excluding other persons who have not any share of the right at all, and no further.

But as I read the 6th section it provides that the person purchasing or otherwise acquiring the right to use any such design "may enter his title in the register hereby provided, and any writing purporting to be a transfer of such design and signed by the proprietor thereof, shall operate as an effectual transfer; and the Registrar shall, on request and the production of such writing, or in the case of acquiring such right by any other mode than that of purchase on the production of any evidence"—that is devolution, such as death or administration—"to the satisfaction of the Registrar," enter it in the register. Now, what is the entering on the register? "I, A. B., author or proprietor of design No. —, having transferred my right thereto," &c. That shows it is a design already registered. You cannot enter on the register a transfer of any design not registered, and that transfer must obviously be in writing, because the writing is produced to the Registrar. So that whenever you get a partial assignment, or a license, or a devolution by law after the registration, it obviously must be in writing.

On the other hand, can you register an assignment or license before the proprietor himself has registered? It would have this very singular consequence if you could. If a license by the author or the sole proprietor of a design be granted before registration, and the licensees had a right to register and to publish, nobody else could register it afterwards, and the original proprietor would lose his right, which would be a singular result. Whereas, if the provision of the act is, as I think it is, to have registration on the part of the author and proprietor before he grants out the partial interests, then there is no difficulty, because every man who gets a partial interest registers under the 6th section, and that grant must be in writing. It seems to me that that is the real meaning of the act, although it is not so perfectly expressed as I should like.

I think that is slightly corroborated by the 10th section, which provides that "in any suit in equity which may be 411] instituted by the proprietor of any design or the person lawfully entitled thereto relative to such design, if it shall appear to the satisfaction of the judge having cognizance of such suit that the design has been registered in the name of a person not being the proprietor or lawfully entitled thereto, it shall be competent for such judge in his discretion by a decree or order in such suit to direct either that such registration be cancelled (in which case the same shall thenceforth be wholly void) or that the name of the proprietor of such design or other person lawfully entitled thereto be substituted in the register for the name of such

wrongful proprietor or claimant."

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That shows, as it appears to me, that it was intended that the original proprietor should register. I am satisfied that the meaning of the act is to make the law very similar in that respect to the patent law, where the original patentee having granted the license, the licensee comes afterwards and registers. There are also other points in the case upon which I think it probable the plaintiffs might not have succeeded.

The action must be dismissed with costs.

Solicitor for the plaintiff: W. W. Wynne. Solicitors for the defendant: Saunders, Hawksford & Bennett.

[8 Chancery Division, 411.]
M.R., March 6, 1878.

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## Mason v. Robinson.

[1877 M. 873.]

Will—Gift of Annuity—Direction to pay out of Income of Residuary Estate—Charges on Corpus—Charging Prospective Income.

A testator bequeathed life annuities to various persons, and then bequeathed his general personal estate to trustees, "upon trust out of the income thereof to pay and keep down" the annuities, and, "subject thereto," upon trusts for his son and daughters:

Held, that the annuities were chargeable on the corpus.

W. H. Mason, coachmaker, by his will, dated the 1st of March, 1876, bequeathed to his wife an annuity of £500 (afterwards \*increased by codicil to £700) during her [412] life; to each of his daughters who should be married in his wife's lifetime an annuity of £100 during the joint lives of such daughters and his wife; and also certain life annuities, amounting altogether to £140, to his sisters and brother therein named. And the testator bequeathed his personal estate not specifically disposed of to trustees upon trust for sale, and to invest the proceeds in some or one of the investments thereinafter authorized, "and to stand possessed thereof upon trust out of the income thereof to pay and keep down such of the annuities hereinbefore bequeathed as for the time being shall be payable; and subject thereto," and to the provisions thereinafter contained as to advances or gifts to his daughters in case of their marrying, and to his son in case of the transfer of his business to him, upon trust, so long as his said son should be living and under the age of twentyone years, to accumulate and invest the surplus income;

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and from and after his said son attaining twenty-five years. or from and after his death, if he should die under that age, in trust, as to the capital and accumulations, for his (testator's) two daughters equally; and the will contained certain trusts of the daughters' shares by way of settlement, with a remainder over, in certain events, upon trusts under which the son was interested.

The testator died in January, 1877, leaving his widow, his son, who was now twenty-one years of age, and his two daughters, both of whom were under age and unmarried.

Besides the annuity of £700 to the testator's widow, the annuities to his sisters and brother were immediately

pavable.

The annual income of the testator's general personal estate amounted to about £700 per annum only, and therefore was now and probably for some years to come would be insufficient to keep down the annuities, amounting to £840 at

present payable.

Under these circumstances the widow brought this action against the testator's trustees and executors, and his three children, claiming a declaration that her annuity of £700 as well as the other annuities, ought to be paid out of the capital and accumulations of the testator's residuary personal estate, so far as the income of such residuary personal estate should be insufficient to pay the annuities.

The action now came on upon motion for judgment. 413] \*Davey, Q.C., and Shebbeare, for the plaintiff: annuities being charged upon the income, and the capital given over "subject thereto," the corpus is liable: Birch v. Sherratt (').

[They were stopped by the court.]

Bagshawe, Q.C., and Chubb, for the children: This case is singular, because there is an absolute prior gift of an annuity, which does not occur, apparently, in any of the reported cases; but we submit that the corpus is not liable, and that this is a simple case of tenant for life and remainderman, as in Attorney-General v. Poulden (1), Baker v. Baker (\*), Miller v. Huddlestone (\*), and Michell v. Wilton (\*). It may be a question whether, if the annuities are not charged on the corpus, they are not a continuing charge on the prospective income; Taylor v. Taylor (\*); even after the deaths of the annuitants; Booth v. Coulton ('); and

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(1) Law Rep., 2 Ch., 644.
(°) 3 Hare, 555.
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<sup>(3) 6</sup> H. L. C., 616.

<sup>(4) 3</sup> Mac. & G., 513.

<sup>) 23</sup> W. R., 789.

<sup>(6)</sup> Law Rep., 17 Eq., 324; 7 Eng. R.,

<sup>(1)</sup> Law Rep., 5 Ch., 684.

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probably that construction would be more unfavorable to the children.

[They also cited Wright v. Callender (1).]

[JESSEL, M.R., referred to Stelfox v. Sugden (\*).]

Roxburgh, Q.C., for the trustees.

JESSEL, M.R.: I have not received from the learned counsel on either side a suggestion that there is any authority that where there is a simple gift of an annuity followed by a direction to set apart a fund to secure it, that will cut down the right of the annuitant to receive only the income of the fund: I must therefore assume that no such author-

ity exists.

Now here is a gift of certain annuities, and a trust or direction to set apart a fund to answer them is created in this way: the testator bequeaths his residuary personal estate to trustees upon \*trust for sale, and to invest [414 the proceeds in some or one of the investments thereinafter authorized, "and to stand possessed thereof upon trust out of the income thereof to pay and keep down such of the annuities hereinbefore bequeathed as for the time being shall be payable; and subject thereto" upon trusts for his son and daughters.

The question is, what is the meaning of the trust in this will? It is a trust to keep down the annuities, in the first place, no doubt, out of income, but it is not the less a trust to keep down: it does not do more than indicate a mode of providing for the annuities previously given. Why, then, should it prevent payment of the annuities being made out of the capital if the income proves insufficient? I am of opinion it ought not to do so, and that the arrears of the annuities may be paid out of the capital if the specific means provided for payment shall not be found sufficient for the

purpose.

Now there are two classes of cases between which I think a distinction should be made. The first is a class of cases of which Baker v. Baker (\*) is an instance, in which the testator has not given the annuity at all, but has directed a sum of money to be set apart which shall be sufficient to pay an annual sum, and then directs the income of the sum so set apart to be paid to a person for life. That is not a gift to an annuitant of a sum of money specifically mentioned, but it is a direction to set apart a capital sum, and what is given, and what the person to whom the income is to be paid takes, is the income of that capital sum which ac-

<sup>(1) 2</sup> D. M. & G., 652.

<sup>(9)</sup> Joh., 234.

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crues due during his life, and nothing else. That is the true

explanation of the decision in Baker v. Baker.

There is another class of cases of which Booth v. Coulton (') is one, in which there is not a gift of an annuity simpliciter, but a fund is directed to be invested, or there is an existing investment, or an existing estate producing income, and the testator directs that out of the income of the sum to be invested, or of the existing investment, or out of the rents of the existing estate, a life annuity is to be paid, and subject thereto the fund or estate is to go elsewhere.

That class of cases has been held to mean this, that, there 415] being \*no direction that the annuity is to be paid out of the income to accrue during the life of the annuitant, the annuity is a charge upon the income even beyond the life of the annuitant, so that no one can take the income till the

arrears of the annuity are satisfied.

Now, my view is, as I have said, that the words here are sufficient to create a charge of the annuities upon the corpus; but if I am not right in that view, the words are at all events sufficient to bring the case within the second class of cases, that is, to create a charge of the annuities upon the income until the arrears of the annuities are made up. I have not, however, been pressed to adopt that view, and looking at the authorities and the reason of the thing, I do not think I ought to extend that inconvenient construction to a case where there is a clear prior gift of an annuity, as in the present instance.

There will, therefore, be a direction that the growing deficiency of income to pay the annuities shall from time to

time be made up out of the capital.

Solicitor: A. T. Cox.

(1) Law Rep., 5 Ch., 684.

[8 Chancery Division, 415.] M.R., March 7, 1878.

CANNON V. VILLARS.

[1878 C. 490.]

Landlord and Tenant—Right of Way, Restricted or General—Obstruction— Injunction.

Defendant, the owner of a house with a gateway and a paved road under it leading to a paved yard, and a vacant piece of ground at the rear, agreed to grant to the plaintiff a lease of the house and vacant ground and the appurtenances, with power to erect on the vacant ground a workshop for the purposes of his business as a gas engineer, and it was stipulated that the plaintiff should not obstruct the gateway.

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except for the purposes of ingress and egress. The workshop was erected, and the only access to it by vehicles was through the gateway and over the yard which were also the only approach to the stables of the defendant, who carried on business in adjoining premises. The defendant's vans, before the agreement was entered into, had often stood in the yard when not in use. The plaintiff now alleged that the defendant blocked up the gateway and yard with his vans, and prevented the access of carts and vehicles to his workshop:

Held, that, under the agreement, the plaintiff had an implied right of \*way [416 through the gateway and over the yard for the reasonable purposes of his business; that such right was general and not restricted; and that he was entitled to an in-

junction to restrain the defendant's obstruction.

This was an action to restrain the obstruction of a right of

way under an agreement.

At the time when the agreement was executed the defendant was the owner in fee of a house, No. 1 Bath Street, Southwark, with a gateway under it, and a yard at the rear, part of which was covered. The road under the gateway, and also the yard, were paved with stone and formed the only approach to certain stables belonging to and occupied by the defendant. The defendant, who was an upholsterer, carried on business in premises adjoining, and kept vans for the purposes of his business, which before and at the time when the agreement was entered into were kept standing, when not in use, in the covered part of the yard.

On the 24th of June, 1876, the defendant entered into an agreement with the plaintiff, who was a manufacturing gas engineer, which agreement, so far as material, was as follows:—

"The landlord agrees with the tenant to grant to him, his executors, administrators, or nominees, and the tenant agrees with the landlord to take, all that messuage situate at No. 1 Bath Street, together with a piece of vacant ground in the rear thereof, measuring forty feet long and ten feet wide at one end, and fifteen feet wide at the other end, with the appurtenances, for the term of fourteen years.

"The said lease is to contain all usual and proper covenants, and particularly power for the tenant to erect on the said vacant piece of ground a workshop for the purpose of his business as a gas engineer; and such lease and the counterpart thereof are to be prepared at the expense of

the tenant.

"The tenant is in no way to obstruct the entrance and gateway, except by the use of the entrance for the purposes of ingress and egress, neither shall the tenant underlet the said house or workshop without the written consent of the landlord."

The plaintiff had entered into possession and erected at 25 Eng. Rep.

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the rear of the yard, in pursuance of the agreement, a work-

shop in which he carried on his said business.

\*The only means of access from the high road to the workshop, excepting through the house door, was through the gateway and over the yard. The gateway, when unobstructed, was sufficiently wide to admit the passage of

trucks, carts, and vehicles of all kinds.

The plaintiff alleged that it was necessary, for the purposes of his business, that there should be a free and unobstructed means of ingress, egress, and regress for trucks, carts, vans, and horses through the gateway and over the yard; that in June, 1877, the defendant began, and had since continued, to block up and obstruct the gateway and yard by permitting his vans to be drawn within the same and to remain there at all hours of the day and night, so that frequently only a passage of from two to four feet was left, and sometimes there was no room for a single person to pass; that thus the plaintiff was prevented from using the gateway and yard for the purpose of taking into or removing from his workshop any work or materials requiring for their conveyance a truck, cart, or van, and from enjoying such right of access as for the purposes of his business he was entitled to enjoy.

The plaintiff alleged that he had sustained loss and injury by these acts of the defendant, and claimed an injunction to restrain the defendant, his agents or workmen, from obstructing or blocking up the gateway and yard, or from interfering with the free ingress and egress of the plaintiff, with or without trucks, vans, carts, and other vehicles.

The defence was that the plaintiff had only a right of footway under the agreement, and not a right of way for trucks, carts, vans, or other vehicles; also, that the defendant had been in the habit of using the covered part of the yard for his own vans before the agreement was entered into, and was still entitled to place them there when not in actual use.

Chitty, Q.C., and Tremlett, for the plaintiff: The plaintiff in this case seeks to establish a right of way either by grant or necessity through the entrance or gateway under the house he occupied and over the yard to the workshop which he has erected at the rear, and claims an injunction to restrain the defendant from blocking it up by his vans. 418] The defendant \*admits that the plaintiff is entitled to a right of footway, but we contend the words of the agreement give him a general and not a limited right of way, for he was authorized "to erect on the vacant piece of ground Cannon v. Villars.

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a workshop for the purposes of his business as a gas engineer." This would imply such right of access to the workshop when erected as the purposes of his business required,

including necessarily access by carts or wagons.

In Newcomen v. Coulson ('), where an award under an Inclosure Act directed that certain allottees of land should have a right of way which in terms was only applicable to agricultural purposes, and provided that in case they should "shut out" the way the same should be of a certain width, an owner of one of the allotments having commenced building houses upon the way, which was before a trackway, it was held that they were entitled to construct a substantial roadway applicable to the purposes for which it was now being applied.

The grantee of a tenement is entitled to sufficient wayleave for the purposes of his tenement. Here the right claimed, having regard to the plaintiff's business, which is referred to in the agreement, must include the right of access for vehicles, and the defendant should be restrained by in-

junction from the obstruction complained of.

Davey, Q.C., and W. C. Harvey, for the defendant: There is nothing in this case to show that this is a way of necessity, nor can it be implied as a way of grant. The words of the agreement, which is only an informal agreement for a lease, cannot be construed as giving more than a right of footway to the defendant's workshops.

In Cousens v. Rose ('), where, under a lease of a dry dock and warehouses, a right of way was established over the whole of a strip of land between the dock and the warehouses, it was held that the right was confined to foot pas-

sengers.

In construing this agreement regard must be had to the relative position of the parties and to the use made by the plaintiff of this gateway and yard at the time when the agreement was entered into. It appears that the plaintiff had been in the habit of using \*the gateway and yard for [419 his own vans, as they constituted the only approach to his stables, and the vans when not in use usually stood under the covered part of the yard. He cannot therefore now, in the absence of express words, be deprived of the reasonable use of the gateway and yard, especially as by the agreement the tenant was in no way to obstruct the entrance and gateway, except for the purposes of ingress and egress. At any rate, if the injunction is granted, it cannot extend to deprive the defendant of the reasonable use of his own freehold. In

<sup>(1) 5</sup> Ch. D., 138; 21 Eng. R., 851.

<sup>(\*)</sup> Law Rep., 12 Eq., 366,

the United Land Co. v. Great Eastern Railway Co. ('), where an injunction was granted to restrain the obstruction of the free use of level crossings over a railway, claimed by the occupiers of neighboring houses, the injunction did not extend to restrain the company from the use of the railway

for the reasonable and proper working of the traffic.

JESSEL, M.R.: This case has been elaborately argued, but I confess it appears to me that there is really no question either as to what is the law or as to what is the true construction of this agreement. In construing all instruments you must know what the facts were when the agreement was entered into. The first fact here is that the only access to the piece of ground let to the plaintiff for the purpose of the erection of the workshop available for any cart, wagon, or other vehicle, was through a paved gateway which was the entrance to a long yard also paved in a manner fitted for the passing of carts, wagons, and other carriages. As I understand, it was a stone paved way, so stoned as to be sufficient and proper for that passage. The only other access at all to the locus in quo was through a door of the house through which it is admitted carts, wagons, and carriages could not The ownership both of the land of the yard and of the gateway was in the landlord, the defendant, Mr. Villars.

The plaintiff is a gas engineer, and wished to take the piece of land up the yard for the purpose of building a workshop on it. At the time the agreement was entered into the land-420] lord had \*some stables up the yard, to which, I am told, no coach house was attached, and he used vans for the purpose of his business, and those vans, of course, when in use were outside in the streets of the town, and when not in use were put under the covered portion of the yard, which immediately adjoined the gateway or entrance. It was stated that these vans did not go out for a whole day, although on working days they usually went out for the whole or a part

of the daylight.

Now I will say a word or two about the law. As I understand, the grant of a right of way per se and nothing else may be a right of footway, or it may be a general right of way, that is, a right of way not only for people on foot but for people on horseback, for carts, carriages, and other vehicles. Which it is, is a question of construction of the grant, and that construction will of course depend on the circumstances surrounding, so to speak, the execution of the instrument. Now one of those circumstances, and a very material circumstance, is the nature of the locus in quo over which

<sup>(1)</sup> Law Rep., 10 Ch., 586, affirming S. C., 7 Eng. R., 738.

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the right of way is granted. If we find a right of way granted over a metalled road with pavement on both sides existing at the time of the grant, the presumption would be that it was intended to be used for the purpose for which it was constructed, which is obviously the passage not only of foot passengers, but of horsemen and carts. Again, if we find the right of way granted along a piece of land capable of being used for the passage of carriages, and the grant is of a right of way to a place which is stated on the face of the grant to be intended to be used or to be actually used for a purpose which would necessarily or reasonably require the passing of carriages, there again it must be assumed that the grant of the right of way was intended to be effectual for the purpose for which the place was designed to be used, or was actually used.

Where you find a road constructed so as to be fit for carriages and of the requisite width, leading up to a dwelling house, and there is a grant of a right of way to that dwelling house, it would be a grant of a right of way for all reasonable purposes required for the dwelling house, and would include, therefore, the right to the user of carriages by the occupant of the dwelling house if he wanted to take the air. or the right to have a wagon drawn up to the door when \*the wagon was to bring coals for the use of the dwelling house. Again, if the road is not to a dwelling house but to a factory, or a place used for business purposes which would require heavy weights to be brought to it, or to a wool warehouse which would require bags or packages of wool to be brought to it, then a grant of right of way would include a right to use it for reasonable purposes, sufficient for the purposes of the business, which would include the right of bringing up carts and wagons at reasonable times for the purpose of the business. That again would afford an indication in favor of the extent of the grant. If, on the other hand, you find that the road in question over which the grant was made was paved only with flagstones, and that it was only four or five feet wide, over which a wagon or cart or carriage ordinarily constructed could not get, and that it was only a way used to a field or close, or something on which no erection was, there, I take it, you would say that the physical circumstances showed that the right of way was a right for foot passengers only. It might include a horse under some circumstances, but could not be intended for carts or carriages. Of course where you find restrictive words in the grant, that is to say, where it is only for the use of foot passengers, stated in express terms, or for

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foot passengers and horsemen, and so forth, there is nothing to argue. I take it that is the law. Prima facie the grant of a right of way is the grant of a right of way having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used; and both those circumstances may be legitimately called in aid in determining whether it is a general right of way, or a right of way restricted to foot passengers, or restricted to foot passengers and horsemen or cattle, which is generally called a drift way, or a general right of way for carts, horses, carriages,

and everything else.

Applying those rules to the case before me. I must say I have no doubt whatever as to the meaning of the agreement. [His Lordship then stated the terms of the agreement.] What do we here find? First we find the plaintiff is to have power to build on the vacant piece of land. That is very material, because it is admitted on the part of the defendant that for the purpose of building in London you require the 422] right to bring up carts or \*wagons with building materials, as otherwise you cannot build conveniently or rea-To this extent, then, at all events, it is absolutely necessary that he must have the right to come with carriages or carts. How does he get it? Only under those words, "ingress and egress;" for I agree entirely with the argument on the part of the defendant, that where you find an express right of way granted (for there is no question about way of necessity), it is a mere question of construction as to what the extent of the right of way granted is. being so, it is plain that he must have the right for wagons and carts, at all events, while he is building. What is to limit it? I see no words of limitation. If he has ingress and egress for wagons and carts for building, why not at all times? However, the matter does not stop there. is he to use it for? He is to use the workshop for his business as a gas engineer. It cannot be seriously contested that the plaintiff has a right to bring up trucks, which he constantly does, and indeed that is not contested; whether he absolutely wants to take up carts is more in contest, but has he not a right to take up coals in a cart or wagon? A gas engineer wants coal, and indeed everybody wants coal in this climate at some period of the year, whether he is a gas engineer or not; and is it to be suggested that the man who is to build a workshop and use it for the purpose of a gas engineer has not a right to bring a cartful of coals up to the shop? When you come to look at it in that way, it is M.R.

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obvious, without going into evidence, that it is a reasonable use of the right of way, and a use suitable for the business which is to be carried on, that he should use the right of ingress and egress for the purpose of bringing up a truck or a cart when wanted. That being so, it seems to me this is clearly to be held a general right of way.

Then there is this consideration also that it is admitted, from the width of the way, and from the character of the way, and from the mode in which the way was paved, that it is a cartway or carriageway, and nothing else, except in so far as a carriageway and cartway always include a footway. It was constructed for that purpose, and used for that purpose. Therefore we have the other ground also present in this case.

Now, as regards the position of the vans, it is quite true the owner of the stables and the owner of the vans did at one time put \*his vans on his own freehold, as he [423] had a right to do, before he executed the grant. But is there anything in that circumstance to show that he is to continue to put them there, obstructing the right of way granted? I cannot find it at all. It may be, after he granted the right of way, he could not keep his vans there quite so long as before; probably he could not keep them there all day at times when the plaintiff wanted to take his trucks up. But that is not a permanent physical obstruction forming a portion of the property demised at the time the right of way is granted over it; it is a temporary accident of the business carried on by the grantor, which might be discontinued at any moment. And even if it had been necessary, which it is not, that his vans should be removed altogether. I should not think that circumstance was one which interfered with the proper legal construction of the grant. I am of opinion, therefore, that the plaintiff is right, and entitled to an injunction to restrain the defendant, his servants, agents, workmen, and others from blocking up or obstructing or permitting the blocking up or obstructing the entrance or yard so as to interfere with the reasonable use by the plaintiff, his servants, workmen and agents, with trucks, vans, carts, and other vehicles for the purpose of his business as a gas engineer. It is not intended to prevent the defendant putting his vans there as he did before, or to prevent the the plaintiff from moving them as he did before.

Solicitors: Woodbridge & Sons; W. Maynard.

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See 21 Eng. R., 862 note; 23 Eng. R., 707 note.

The owners of three separate estates abutting on a passage-way leading from a public street in a city, and owned by them in common, in 1769, executed an indenture by which it was agreed that the passage-way measured nine feet on the street and six feet, four inches at the upper end, and that it should always lie open and unincumbered for the use of their respective estates according to these measurements. In 1826, the then owners, by deed, narrowed the way at one end and widened it at the other, but made no change in its use, and referred to the indenture of 1769 for a more particular description. Held, that each owner had a

right to have the passage-way kept clear and unincumbered throughout its entire length and breadth, and not merely a reasonable right of way over it..

If A. and B. own separate estates abutting on a passage-way owned by them in common, which each has the right to have kept open and unincumbered throughout its entire length and width, and B. places therein obstructions of a permanent and continuous character, to the injury of A.'s estate, A. may maintain a bill in equity against him, after notice to remove them, although A. has previously brought an action at law against B, which is still pending: Nash v. New England, etc., 127 Mass., 91.

[8 Chancery Division, 424.]

M.R., May 1, 1878. .

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\*MAYER V. MURRAY.

[1877 M. 142.]

Practice—Mortgagee in Possession—" Usual Account"—Proceeds of Sale—" Wilful Default"—Form of Judgment.

In an action for account by a mortgagor against a mortgagee in possession who has sold, the mortgagor is entitled to an account of the proceeds of sale received by the mortgagee or by his order or for his use, "or which without his wilful default might have been so received;" although wilful default may not have been charged in the pleadings and proved at the trial; but such an account does not entitle the mortgagor to question the propriety of the sale or the adequacy of the amount for which the property has been sold.

Job v. Job (1) explained.

THE statement of claim alleged that in 1868 the plaintiff mortgaged certain leasehold houses to E. W. Robertson as security for £2,000; that in 1870 Robertson entered into possession of the mortgaged premises, and afterwards sold the same by auction in lots; and that the defendant, J. Mur-

ray, was Robertson's executor.

The plaintiff claimed to have it declared that the defendant was liable to pay him certain specific sums of money, and also to account for all moneys received by Robertson and the defendant and each of them, "or which but for their or his wilful default might have been received by them or him, and also for all profits made by the defendant in respect of the premises;" and that an account might be taken on the footing of the foregoing declarations of what was due

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to the plaintiff in respect of the mortgaged premises; with consequential relief.

The defence admitted the mortgage, the taking possession of the mortgaged premises, and the fact of the sale, but de-

nied anv liability.

The action came on for trial on the 19th of March, 1878, when the order made, according to the Registrar's note, was, "Decree the usual order for account against a mortgagee in possession, and \*dismiss the rest of the ac- [425 tion." The counsel for the plaintiff indorsed his brief, "Decree an account of all the moneys received in respect of the mortgaged premises by Robertson and the defendant, or which might have been received by them without wilful default, and dismiss the rest of the action." The counsel for the defendant indorsed his brief in substantially the same terms, except that, "wilful default" was limited to the rents and profits and did not extend to the proceeds of sale.

The minutes of judgment as given out by the Registrar directed, in addition to the usual account of rents and profits which the mortgages might have received without his wilful default; an inquiry whether any of the hereditaments comprised in the mortgage security had been sold, and, if so, by whom; and if it should appear that any part thereof had been sold by Robertson or the defendant, Murray, then an account of the proceeds of any such sale received by Robertson or the defendant, Murray, or by any other person by their order or for their use, "or which without the wilful default of the said E. W. Robertson or of the said defendant, J. Murray, might have been so received."

The statement of claim contained allegations amounting to charges of wilful default against Robertson and the defendant, Murray, but at the trial the plaintiff failed to prove

them.

The defendant now applied to his Lordship to settle the minutes by striking out the "wilful default" clause in the

proceeds of sale account.

Millar, for the defendant: There is no form of the court which charges a mortgagee in possession with wilful default except in respect of rents and profits, and it is entirely novel to say that a mortgagee selling is liable for wilful default, when no case of wilful default has been proved against him. The two forms of a decree against a mortgagee in possession in Seton on Decrees ('), charge wilful default only in respect of rents and profits, and the reason why he is so charged is that he must account for what he receives in his character

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of mortgagee in possession: all he has to show is that the original owner is not injured by his having taken possession. 426] I do not \*dispute the right of the mortgager to have an account of proceeds of sale, but I submit that to charge the mortgagee with wilful default under that account, no case having been proved against him, is entirely contrary to the usual practice, and if the indorsement on my brief is correct, your Lordship intended that "wilful default" should be confined to rents and profits, in the usual way.

Mulligan, for the plaintiff, was not called upon.

JESSEL, M.R.: The question I have to decide is one of principle, and it also depends to a certain extent upon authority. There seems to be some doubt as to what order I made at the trial of the action, but what I really did decide at the time I take from the Registrar's note. From that note I see I directed the "usual account against a mortgagee in possession," under the circumstances that the mortgagee in possession had received the rents and sold, and the real question is, what, under such circumstances, is the proper form of account to be adopted on an order for the "usual account against a mortgagee in possession?"

Now, there is very little to be found upon the subject in the books; the first question, then, I must consider is, what is the principle? Every mortgagee who sells and receives the purchase-money is liable for wilful default if he does not receive what he might have received by due diligence; so is any ordinary trustee. Therefore the only point is whether you ought to make a decree against him for wilful default without wilful default being charged against him on the pleadings and proved at the trial; because, if the charge is proved at the trial, there is no doubt what the

proper form of decree ought to be.

I will here say a word upon the case of Job v. Job (') which was recently before me and which, I understand, has led to some misapprehension. I there said that in an administration action an order charging an executor with wilful default may be made at any time during the progress of the action. Now an order charging an executor with wilful deaction. Now an order charging an executor with wilful deaction. Now an order charging an executor with wilful deaction. Now an order charging an executor with wilful deaction. The pleadings: therefore the charge, unless originally pleaded, must be introduced by amendment—that is, of course by amendment at any stage of the action at which amendments may be made, that is, before judgment. The general rule is that in every case an order charging wilful

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default must be based upon a charge of wilful default in the

pleadings.

There has, however, been always one exception to that rule, namely, in the case of a mortgagee in possession. You always make a decree against him of wilful default in respect of rents and profits, though no charge of wilful default has been made on the pleadings and there has been no proof of it at the trial. That is the exception to the general rule. On what principle does that exception depend?

Now upon that, one may refer to the books to see, first, what is the extent of the exception to the general rule, and, secondly, what is the supposed reason on which the exception is founded. One reason, perhaps, formerly, was that the court looked with less favor on a mortgagee, who, though a trustee, derives a benefit from his trust, than on ordinary or gratuitous trustees who receive no remuneration for their duties. I will first of all refer to the text-books.

In Seton on Decrees (') only two forms are given of a decree against a mortgagee in possession, but neither of them relate to the case of a sale by the mortgagee; they do not therefore throw much light upon the subject. But on referring to Mr. Fisher's very learned work on Mortgages, I find he says this ('): "The account usually directed against the mortgagee in possession either of tangible property or of a business is of what he has, or without wilful default might have, received from the time of his taking possession."

The rule as so stated covers the case before me. It covers tangible property or the good-will of a business, the mortgagee being liable to account for what without wilful default he might have received from the time of his taking posses-Mr. Fisher's statement of the rule is quite general, and would, in my opinion, be sufficient to decide the case even if it stood alone; but there are two authorities which seem to me to be conclusive on the point: \*one of [428] them is Williams v. Price (\*), before Sir John Leach. a debtor who was entitled to a judgment debt assigned it to his creditor by way of mortgage. By the creditor's wilful default, he having sued out execution, but omitted to enforce it, the debt ultimately became lost, and the question was whether the creditor ought to be responsible for the loss. Sir John Leach says this ('): "Here the creditor, by suing out execution, assumed, as it were, the possession or control of this judgment in exclusion of the assignor, and is within the principle which charges the creditor in possession

<sup>(1) 8</sup>d ed., pp. 866, 867.

<sup>(\*) 8</sup>d ed., vol. ii, p. 943.

<sup>(\*) 1</sup> S. & S., 581. (\*) 1 S. & S., 587.

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of property held by him as a security, not only with what he actually receives, but with what he might have received but for his wilful default or neglect."

Here, then, I have the principle stated by a learned judge of great experience, namely, that where a creditor has the control of a security he is chargeable with what he might

have received from it but for his wilful default.

The only other case to which I think it necessary to refer —no authorities have been cited to me—is Lord Kensington v. Bouverie (1). There Lord Justice Turner says (2), "No special case of wilful default is made by this bill, and this court, as I apprehend, never directs an account of what, without wilful default, might have been received, otherwise than upon a special case made for the purpose, except in the case of a mortgagee in possession." And further on he says (\*), "A mortgagee, when he enters into possession of the mortgaged estate, enters for the purpose of recovering both his principal and interest, and, the estate being, in the eye of this court, a security only for the money, the court requires him to be diligent in realizing the amount which is due, in order that he may restore the estate to the mortgagor, who, in the view of this court, is entitled to it. part of his contract that he should do so."

It appears to me, therefore, both on principle and authority, that the proper form of account against a mortgagee in possession who has sold is, an account of the proceeds of sale received by him or by his order or for his use, "or 429] which without his wilful default \*might have been so received." The minutes as given out by the Registrar must therefore stand, but it should be clearly understood that the account is to be limited to the proceeds of the sales, and does not entitle the plaintiff to impeach or question the propriety of the different sales, or the adequacy of the

amounts for which the properties were sold. Solicitors: R. J. Woodfin; W. M. Miller.

(1) 7 D. M. & G., 184.

(\*) 7 D. M. & G., 156. (\*) 7 D. M. & G., 157.

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[8 Chancery Division, 480.] V.C.M., Feb. 4, 5; March 19, 1878.

Rowbotham v. Dunnett.

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[1876 R. 227.]

Will—Secret Trust—Charitable Purposes—Tenants in Common.

A testatrix devised real estate to two persons, their heirs and assigns, as tenants in common, for their personal use and benefit, without any restriction, trust, or condition whatever. One of the devisees was a mere acquaintance of the testatrix, and the other was her solicitor, who prepared her will and to whom she expressed her intention of leaving her property to charitable purposes. The solicitor informed her that such a devise would not be legal, and this absolute gift was then executed. No undertaking, express or implied, was given by the devisees to accept a charitable trust, though the testatrix probably expected that the devisees would apply the property to some good and useful, but not necessarily charitable, purpose:

Held, that whatever might have been the wish or expectation of the testatrix, the devisees were not bound by any secret trust to carry out such intention, but were free to dispose of the property as they pleased; and an action claiming to have the devise declared void was dismissed.

One of the devisees had no intimation during the life of the testatrix that she had

devised property to him:

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Held, that the gift to him, as one of two tenants in common, would not have been void even if a secret charitable trust had been proved with regard to the other devisee, though it would have been so in the case of joint tenants.

ROSINA ROWBOTHAM, by her will, dated the 20th of September, 1866, appointed the defendants, Daniel Dunnett, a solicitor, and John Minors, gentleman, her executors; and, after giving certain specific legacies, she bequeathed all the residue of her personal estate to the defendants, upon trust to convert the same into money, and to pay the whole of such money, or such part thereof as might be legally bequeathed for charitable purposes, to the treasurer for the time being of the Royal Society for the Prevention of Cruelty to Animals, and she directed such portions of her personal estate as could not be legally bequeathed for charitable purposes to be added to and disposed of with the proceeds of her real estate as thereinafter mentioned. the testatrix devised all her real estate to the defendants, their heirs and assigns, upon trust to sell the same, and out of the moneys arising therefrom, \*and also any portion of the moneys arising from her residuary personal estate not available for charitable purposes, to pay her debts and legacies; and as to the residue of the moneys to arise as aforesaid, the testatrix bequeathed the same to the defendants, D. Dunnett and J. Minors, in equal shares, not in their character of trustees or executors, but for their own respective personal use and benefit absolutely, without any trust, restriction, or condition whatsoever, and to be vested

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interests in them immediately after her death. And the testator declared that it should be lawful for the defendants, out of the moneys which should come to their hands by virtue of the trusts of her will, to reimburse themselves all costs, charges, and expenses which they should pay or sustain in the execution of the trusts of her will; and in particular, she directed that the defendant D. Dunnett should, in case of his acceptance of the trusts, be the solicitor to her said trust property, and as such, notwithstanding his acceptance of the trusteeship, should be allowed all professional charges which, if employed as solicitor to her trustees, not being himself a trustee, he would be entitled to make.

The testatrix died on the 4th of May, 1870, and was then seised and possessed of real estate of considerable value, and possessed of personalty consisting as well of pure personalty applicable to charitable purposes, as of mixed personalty

not so applicable.

The statement of claim was to the effect that the testatrix had few near relations, and it was her wish, often expressed, that the whole of her property, both real and personal, should at her death be applied for charitable purposes. Some time prior to the date of the will the testatrix gave instructions to D. Dunnett, who was her solicitor, to prepare a will for her, by which the whole of her property should be disposed of for charitable purposes, but he explained to the testatrix that such part of her property as consisted of real estate and of personal estate savoring of the realty could not be so applied; and after many interviews and conferences it was finally arranged between the testatrix and D. Dunnett that the testatrix should devise and bequeath the residue of her property, both real and personal, to D. Dunnett and to the defendant J. Minors, who was only slightly known to the testatrix, but was a friend and client of D. Dunnett, in manner hereinbefore \*mentioned, and that they should hold the same upon trust for charitable purposes; that the defendant D. Dunnett communicated the aforesaid arrangement to J. Minors, and he approved thereof and assented thereto, and the will of the testatrix was prepared accordingly by D. Dunnett; that when the testatrix executed her will and bequeathed the residue to the defendants in manner aforesaid, she intended that it should not be applied by them for their own benefit, but for charitable purposes, and the defendants, either by words directly, or by signs or silence indirectly, led the testatrix to believe, and she did believe, that her intentions would be carried

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into effect, and that unless the testatrix had believed the defendants would apply the property so devised and bequeathed to them for charitable purposes, and not for their own benefit, the residuary devise and bequest in their favor would not have been contained in the will of the testatrix; and this was well known to both the defendants, and the devise and bequest was accepted by them, either expressly or tacitly, on that footing.

The plaintiff Thomas George Rowbotham was the heir-atlaw of the testatrix, and the plaintiff James Stevens was the legal personal representative of John Edward Stevens, deceased, who was one of the next of kin of the testatrix living

at her death.

The defendants had sold all the real estate of the testatrix, and they had converted into money all her mixed personal estate; they had paid all her debts and legacies, but they held the surplus with the intention of applying the same from time to time as occasions might be presented, for

charitable purposes.

The plaintiffs claimed to have it declared that the residuary devise and bequest to the defendants contained in the will of the testatrix, Rosina Rowbotham, was made to them upon a secret trust for charitable purposes; and that the defendants were trustees of the proceeds of the sale of the real estate thereby devised for the plaintiff Thomas John Rowbotham, and of the mixed personalty thereby bequeathed for the plaintiff James Stevens and the other next of kin, or the representatives of such of the next of kin as might be dead (if any); and to have the trusts of the will carried into execution, and the real and personal estate of the testatrix administered under the direction of the court.

\*The statement of defence was put in by both [433 defendants (but Minors had since died), and it was to this

effect:

The testatrix never expressed to the defendants, or to either of them, or to any other person, her wish that the whole of her property, both real and personal, should at her death be applied for charitable purposes, and she never at any time gave instructions to the defendant D. Dunnett to prepare a will for her by which the whole of her property should be disposed of for charitable purposes.

The whole of the legacies and the annuity bequeathed by the will were given entirely upon the suggestion and at the dictation of the testatrix without any suggestion whatever

of D. Dunnett.

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The defendant J. Minors and the testatrix lived all their lives in the same parish, within a little more than a mile of each other; they were in the same position in life, both being landed proprietors, and they were both well acquainted with each other, frequently seeing each other upon parochial business. J. Minors, on two different occasions in the seven years which preceded the making of the will, consulted D. Dunnett professionally, but J. Minors was not further or otherwise a client of the defendant D. Dunnett.

D. Dunnett never communicated any arrangement whatever relative to the disposition of the testatrix's property to J. Minors, and J. Minors did not assent thereto, and the will of the testatrix was not prepared to meet such arrangement. J. Minors was never informed of the bequest of the residue

in his favor till after the testatrix's death.

When the testatrix executed her will, and bequeathed the residue to D. Dunnett and J. Minors, she did not intend that it should not be applied by the defendants for their own benefit, or that the same should be applied for charitable purposes, and the defendants did not, nor did either of them, by words directly, or by signs or silence indirectly, lead the testatrix to believe, nor did she believe, that her alleged intentions would be carried into effect.

The defendant D. Dunnett explained to the testatrix that her trustee could be bound by no promise, express or implied, to apply any portion of what she gave them for any of the charities \*she had named in her previous will. or for any charitable purposes whatever; that she must understand that they must have the absolute control and disposal of the residue, and that if they chose to put the money in their own pockets they were entirely at liberty to do so. The testatrix replied that she perfectly understood that she could not legally give any part of her real estate, or of the proceeds of sale thereof, for any charitable purpose, that she would give all she could of her personal estate to the Society for Prevention of Cruelty to Animals, which she cared most for, and that as to the rest she understood and was quite content that her trustees should apply it to any purpose they thought fit, and she was quite satisfied they would make good use of the money.

Mr. Dunnett had also put in an answer to interrogatories, in which he stated that the only suggestion made by him, save as in the statement of defence mentioned, was in a letter dated the 16th of February, 1866, written to the testatrix,

containing these words:

"There is another way by which your wishes may be car-

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ried out, that is, by giving your trustees a discretionary power as to the application of the proposed charitable fund. I cannot, however, advise you to adopt this, as it would be treading upon dangerous ground and might open the door for expenditure of your property in litigation. If, however, you should decide upon this course, I should certainly wish and advise that the will be prepared by experienced counsel. The law is so very jealous of land, or money arising from the sale of land, which is the same thing, being given by will to charitable purposes, that every precaution is requisite."

Mr. Dunnett was examined in court as a witness, and said: "The testatrix would have given all her property to charity if the law had permitted it, but I told her it would not. I did not give the testatrix to understand that I should apply the trust property in any particular manner. I believe she left the property to me and Mr. Minors to do as we liked with, but she impressed no obligation upon us."

Glasse, Q.C., and Bury, for the plaintiffs: can have any doubt upon the facts of this case that the \*testatrix gave this property to the two trustees, [435] Messrs. Dunnett and Minors, for the purpose of being The first will made by applied for charitable purposes. the testatrix seems to have been such as would have been decidedly void. Mr. Dunnett told his client that such would be the effect of it, and then he set himself to discover some means of evading the law. He wrote to her, indicating a mode by which she could carry out her intentions, and eventually the scheme suggested for giving the property to trustees with a discretionary power as to its application was carried out. No doubt this scheme was cleverly devised. Mr. Dunnett well knew, as he said, that he was treading upon dangerous ground and that every precaution was requisite. He certainly did use every precaution, and the question now is whether he has succeeded in evading the Statute of Mortmain. It is perfectly clear that Mr. Dunnett is morally bound to apply the property to charitable purposes, and if this is established the case against Mr. Dunnett is proved. The co-trustee, Mr. Minors, was merely used as a tool. He was no more than a slight acquaintance of the testatrix, and he was evidently not a person to whom she would have given her property absolutely. The facts show clearly that the testatrix devised the property in full reliance that the devisees would carry out her object and that the trust was tacitly accepted by them, and this brings the 25 Eng. Rep.

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case within Springett v. Jenings ('), Jones v. Badley ('), and Wallgrave v. Tebbs ('). An intimation to a devisee of the testator's intentions and wishes to give his property to charity, and an intimation by the testator that he had confidence in his devisee and was satisfied that his wishes would be carried out, was held, in Russell v. Jackson ('), to amount to an undertaking to carry out a secret trust. The same principle was applied in the case of Paice v. Archbishop of Canterbury (').

J. Pearson, Q.C., and Field, for the defendants: The case against these two defendants is very different. As regards Mr. Minors, there is no evidence to show that the wishes of the testatrix, whatever they might have been, were 436] ever \*communicated to him. He was not even informed of the devise during the life of the testatrix, and as the two devisees take as tenants in common, Mr. Minors cannot be affected by anything that was said to Mr. Dunnett.

That was laid down in Tee v. Ferris (\*).

Then, as to Mr. Dunnett, it may be admitted that he was aware of what the testatrix's wishes were, and that he may now intend to carry those wishes into effect, but that is not sufficient to render the devise void. In *McCormick* v *Grogan* (') the testator left his property to Mr. Grogon absolutely, and also left him a letter which contained instructions, but asked for no consent from Mr. Grogan as to any disposal of the property, and there it was held that there was not any trust created which was binding upon the devisee.

The words of the will in this case are distinct, and parol evidence cannot be admitted for the purpose of explaining the testatrix's intention: *Irvine v. Sullivan* (\*). If there was any trust intended it is not binding upon either of the devisees.

Glasse, in reply.

March 19. Malins, V.C.: The question to be determined in this case is, whether the testatrix gave her residuary estate to the two defendants for their own benefit, or upon a secret trust for charity. The question relates to property, the produce of real estate as I understand it, of the value of £6,000 or £7,000. The plaintiffs sue as next of kin, and heir-at-law of the testatrix, and they contend that although

<sup>(1)</sup> Law Rep., 10 Eq., 488; Law Rep., 6 Ch., 333.

<sup>(2)</sup> Law Rep., 3 Eq., 635. (3) 2 K. & J., 313.

<sup>(4) 10</sup> Hare, 204.

<sup>(5) 14</sup> Ves., 364. (6) 2 K. & J., 357.

<sup>(\*)</sup> Law Rep., 4 H. L., 82. (\*) Law Rep., 8 Eq., 673.

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the gift to the defendants was in terms absolute, it was in fact intended by her to be applied to charitable purposes, and that the defendant Dunnett either undertook or tacitly led the testatrix to believe it would be so applied.

[His Lordship then read the will and the statement of

claim and of defence, and continued:

Upon the facts it is clear that the defendant J. Minors never \*knew that the testatrix had made any bequest in his favor until after her death, and he could not, therefore, have entered into any engagement with her, either express or implied, as to the application of the property. It is perfectly clear from the evidence that he knew nothing of the will until after the death of the testatrix; nor had he at any moment of his life the slightest expectation that he would benefit by her bounty. The case on this point is precisely the same as Tee v. Ferris ('). It is this exact case. Here, it may be observed, the residue was given to Mr. Dunnett and Mr. Minors as tenants in common. Communications to one of two devisees which might affect the other, if a joint tenant, cannot affect the other of two tenants in In the case of Tee v. Ferris I have made a short note of what I consider the point: "There being a communication of the intention to one of four tenants in common that charity was intended, his silence amounted to an acceptance of the trust, and rendered the devise to him void, but did not affect the three-fourths, there being no communication to the other three tenants in common.

It is clear upon that authority, as upon principle, that the bill as against Mr. Minors in this case must be dismissed, because he knew nothing of the will, and received no communication; the testatrix did not even tell him she was going to make him executor or residuary legatee, or devisee; therefore he finds the property after her death bequeathed to him, and no trust is expressed; it is given to him absolutely, and he is entitled to treat it as an absolute gift to

him for his own benefit, as the will states it to be.

As regards the defendant D. Dunnett, the question depends upon whether he expressly or impliedly led the testatrix to believe that the property would be applied by him to charitable purposes. If he did, then there is a resulting trust for the heir-at-law as to the real estate, and for the next of kin as to the impure personal estate. The rule applicable to the subject is correctly, or, as Lord Cairns expressed it, "felicitously," laid down by Lord Hatherley, then Vice-Chancellor Wood, in Wallgrave v. Tebbs. The

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Vice-Chancellor says this ('): "Where a person knowing that a testator in making a disposition in his favor intends it to be applied for purposes other than his own benefit, either expressly promises or by silence implies that he will 438] carry the testator's intention into \*effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust, and in such a case the court will not allow the devisee to set up the Statute of Frauds—or rather the Statute of Wills, by which the Statute of Frauds is now, in this respect, superseded; and for this reason—the devisee by his conduct has induced the testator to leave him the property, and as Lord Justice Turner says, in Russell v. Jackson (1), no one can doubt that if the devisee had stated that he would not carry into effect the intentions of the testator the disposition in his favor would not have been found in the will. But in this the court does not violate the spirit of the statute, but for the same end namely, prevention of fraud—it engrafts the trust on the devise, by admitting evidence which the statute would in terms exclude, in order to prevent a party from applying property to a purpose foreign to that for which he undertook to hold it. But the question here is totally different. Here there has been no such promise or undertaking on the part of the devisees. Here the devisees knew nothing of the testator's intention until after his death"—that is, as I said, Mr. Miners' .case. "That the testator desired, and was most anxious, to have his intentions carried out is clear. But it is equally clear that he has suppressed everything illegal." The great object of the testator in the case before the Vice-Chancellor of Wallgrave v. Tebbs (\*) was charity, and no doubt he gave the bequest expecting it to be applied to charitable purposes. But he says, "He has abstained from creating, either by his will or otherwise, any trust upon which this court can possibly fix. Upon the face of the will, the parties take indisputably for their own benefit." Then with regard to this particular case, he concludes his judgment by stating that "the statute prevents the court from looking at the paper writing in which the testator's intentions are expressed, and the parties seeking to avoid the devise have failed to show that, during the testator's lifetime, there was any bargain or undertaking between the testator and the devisees, or any communication which could be construed into a trust, that they would apply the property in such a manner as to carry the testator's intentions into effect. The devise, therefore, is a valid devise, and the

<sup>(1) 2</sup> K. & J., 321, 322.

<sup>(9) 10</sup> Hare, 204.

<sup>(3) 2</sup> K. & J., 313.

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bill must be dismissed." In that case it was a bill seeking to make them trustees.

\*A case of the same kind (and a very remarkable [439] case) is Lomax v. Ripley (1). It does not seem to have been cited, although it was decided before the decision of the Vice-Chancellor in Wallgrave v. Tebbs (\*); whether it had not been reported at that time I do not know, and the reports do not give you the means of knowing. It was a case which occupied much time and attention. There the testator, being possessed of more than £100,000, desired to found a charity at Lancaster. He was told he could not do this by his will, and therefore he gave all his residue to his wife absolutely. He gave his will to her, and at the same time gave her a letter and a sealed packet. He afterwards opened that sealed packet, even in the presence of his wife. He made an alteration in the letter, communicated that alteration to his solicitor, but the wife was not told the contents of the sealed packet or of the letter. The wife knew perfectly well what her husband's views were, and he knew perfectly well what her views were, and that she would certainly carry into effect his intentions after his death, but there was no communication to her. After his death, the letter being opened on the day of the funeral, it was then found what the object was. On that ground there was a I was counsel in the case, and the leading contest about it. counsel of the day were in it. The contention of the plain-tiff entirely failed, because although the court (the Vice-Chancellor Stuart) was perfectly satisfied as to what the object of the testator was, there was no understanding on the part of the widow during his lifetime. However, she most religiously carried his intention into effect after his death, as may be seen at Lancaster, where the lady afterwards founded a charity, and I believe anybody who knows the town of Lancaster knows the Ripley Charity.

Now, the rule which was laid down by Lord Hatherley in the case I have cited was adopted and acted upon in the case of Jones v. Badley (\*), overruling the decision of the Master of the Rolls (Lord Romilly). There the testatrix devised the residue of her real estate not applicable under her will to the purpose of mortmain to A., and B. his son, as joint tenants. A bill was filed impeaching the devise to A. and B., on the ground that the testatrix had made the \*devises to them on a secret trust for charitable pur- [440 poses, and it was held that the onus lay upon the plaintiffs to show that a trust for charity was communicated to, and

<sup>(1) 3</sup> Sm. & Giff., 48.

<sup>(9) 2</sup> K. & J., 318.

<sup>(3)</sup> Law Rep., 3 Ch., 364.

expressly or tacitly accepted by, the devisees, and that the plaintiffs had failed upon the evidence to make out this The decree of the Master of the Rolls was reversed. Lord Cairns there stated the rule as I have done, and as laid down by Vice-Chancellor Wood, and says: "The law applicable to the case being therefore free from doubt, we have to examine the facts, for the purpose of ascertaining the answers to two questions. First, did the testatrix, so far as her own mind and intention were concerned, devise her residue to the Messrs. Badley, in order that they might take, not beneficially, but as trustees for the accomplishment of some charitable purpose? And secondly, if the first question is answered in the affirmative, was her mind and intention in this respect made known before her death to the Messrs. Badley, or either of them, and was the devise accepted by them, or either of them, expressly or tacitly on this footing?" The property in that case was very large. "As to both these questions the onus of establishing the affirmative must be upon the plaintiffs." Then his Lordship commented at length on the evidence, and said: "On the whole, I am of opinion that, whatever charitable desire or object may have existed in the mind of the testatrix when she made this devise of the residue, the plaintiffs have entirely failed to show that any secret trust for charity was communicated to, much less accepted or acquiesced in by, the defendants or either of them. I am of opinion that the decree must be reversed and the bill dismissed. I assume that in such a case no costs will be asked for."

Finally, the same principle was acted upon by the House of Lords in the case of McCormick v. Grogan ('). There the facts were these: The testator, several years before his death, had made his will in favor of a friend, Mr. Grogan, having very many near relations. He was seized with cholera, and on the day of his death—a few hours, indeed, before his death—he sent for Mr. Grogan and told him he had made a will in his favor, and that he would find a letter in a particular drawer. Mr. Grogan said he did not know where the drawer was. The testator was a large \*merchant who had a number of clerks, and he said, "My clerks will tell you," and accordingly in the drawer was found a letter expressing the wish of the testator as to various dispositions which he said were not to be obligatory on Mr. Grogan, and Mr. Grogan never saw the letter in the lifetime of the testator. When he was told by the testator, "I have made my will, and given you everything," he said, "Can

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that be right?" The testator said, "Yes, I will not have it otherwise." The result was that Mr. Grogan took all the property. He seems to have been treated by the House of Lords with the greatest possible respect, as a man acting with great probity in the matter, in carrying out the wishes of the testator in this letter, which was not binding upon He gave nothing to Mr. McCormick's relations; he refused to give anything to them, for reasons which were no doubt best known to himself; and the question was, whether, under those circumstances, he was bound by the terms of the letter. The decision proceeds on the same ground as the other case to which I have referred, of Lomax v. Ripley('), that although there was a wish on the part of the testator that certain things should be done, that wish had not been communicated by the testator to the legatee in the lifetime of the testator, there was no undertaking to fulfil them expressed or implied by assent, undertaking, or by silence giving such assent, and therefore it was held that Mr. Grogan was in no way bound, and was perfectly at liberty to dispose of the property as he thought fit. Russell v. Jackson (1), which was most relied upon by the plaintiffs, the intention of the testatrix to give the property for charitable purposes was actually communicated to the devisees, and Sir George Turner was satisfied that they had undertaken the trust, and that the property would not have been given to them if they had not done so. Therefore the trust was binding upon them, and rendered the devise to them void, the property not being capable of being given to charity. In Springett v. Jenings ('), also relied upon by the plaintiffs, the testatrix conveyed the lands in question to charitable purposes. She had actually executed a deed devoting them to charitable purposes, but having died within a year after the execution of the deed, it became void. But, to \*meet that contingency, she devised the property comprised in the deed to two of the three trustees appointed by it. She had frequent conversation with one of them (they were joint tenants there, which makes a marked diference) on the subject of the charity. It was held that he had not been asked to promise, and had made no promise. Lord Romilly was satisfied that the testatrix was induced by silence to believe that he would carry out her wishes.

In the present case there is one point which I ought to have adverted to. I have cited several cases in which letters were written, not communicated in the lifetime of the

<sup>(1) 3</sup> Sm. & Giff., 48.
(2) 10 Hare, 204.
(3) Law Rep., 10 Eq., 488; Law Rep., 6 C. H., 333.

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testator, and wherever a letter was written or a verbal communication was made to the devisee in the lifetime of the testator, implying that the trust was to be created, and the legatee assents to that, he is bound; but the remarkable feature in this case is, that, on the day on which the will was made, the testatrix added these words by way of precaution, which are, I understand, in the handwriting of one of Mr. Dunnett's clerks, and were drawn up by Mr. Dunnett himself and signed by the testatrix: "Whereas, by my will, bearing even date herewith, I have bequeathed to Mr. Daniel Dunnett and Mr. John Minors, in equal shares, the residue of the moneys arising from the sale of my real estate, for their own use and benefit absolutely, and without any trust, restriction, or condition, and I have made this bequest to enable the said Daniel Dunnett and John Minors, if they shall think fit, but not otherwise, to benefit the funds of certain public institutions in which they are aware I take an interest, but I hereby expressly declare that I have not imposed any secret trust or confidence upon the said Daniel Dunnett and John Minors in regard to such institutions, nor have they or either of them given me any express promise or assent to devote the whole or any portion of the moneys so bequeathed to them for the benefit of such public institutions or any of them, and I declare that, with regard to the application of the moneys so bequeathed to the said Daniel Dunnett and John Minors, it is my wish and intention that they should have the most entire and uncontrolled discretion, and I have made this declaration for the purpose of explaining fully my intentions with regard to such bequest in case any of my relations should call the same in question, and to show that I am fully aware of the disposition I have made, and that there is no legal obliga-443] tion \*on the part of the said Daniel Dunnett and John Minors, or either of them, to apply any part of the moneys bequeathed to them otherwise than as mentioned in my said will." Therefore, on the face of the will, the property is given absolutely, and it is positively sworn by Mr. Dunnett that no undertaking whatever, express or implied, was entered into, and there is this document which says expressly she does not intend to create a trust. Of course it cannot be read as part of the will, but, so far as it goes, it bears out what in other respects has been stated.

In the present case, therefore, upon consideration of the whole evidence and circumstances, I am satisfied that, although the testatrix hoped and believed that the defendants would apply the property given to them in a manner V.C.M.

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consonant with her views and wishes, she did not impose any obligation upon them. She expected, as Mr. Dunnett states, that they would apply the property to some good and useful, but not necessarily charitable, purpose, or, as he states in his examination, which I have read, "She left the property to me and Mr. Minors to do as we liked with, but imposed no obligation upon us." I am therefore of opinion that the action must be dismissed as against Mr. Dunnett also.

I do not know what is suggested with regard to costs. There is the passage in Lord Cairns' judgment—"I assume in such a case costs will not be asked."

J. Pearson, Q.C., pressed for costs.

MALINS, V.C.: I am bound to say that the case, to use an ordinary expression, is one that runs as close to the wind as any I have ever seen. It is a very difficult case, and one that demanded inquiry. Under the circumstances, therefore, I will dismiss the action without costs. The executors will have their costs out of the estate, and I am afraid the plaintiffs will have to bear their own costs. I would give them costs if I could, but if not assented to I cannot do so.

Solicitors for plaintiffs: Young & Thompson. Solicitors for defendants: Field, Roscoe & Co.

> [8 Chancery Division, 444.] V.C.M., March 26, 1878.

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Bankers-Partnership Accounts-Accounts of individual Partners-Equitable Mortgages-Right of Foreclosure, not Sale.

Where accounts are kept at a bankers by a firm, each partner having a right to draw checks, and also by the individual partners of the firm, it is not the duty of the bankers to inquire into the propriety of any transfer of funds which may be made from and to the different accounts.

Upon the death of one partner in a firm having an account at a bankers, the surviving partner has a right to draw checks upon the partnership account.

The right of an equitable mortgagee by deposit of deeds without a written memorandum is a decree of foreclosure, not sale.

THE plaintiffs, J. Backhouse & Co., were bankers at Middlesborough. The defendant, Robert Hedley Charlton, was a customer of the bank, and in May, 1874, he had £7,962 standing to the credit of his account at the bank. At that time the defendant was about to purchase certain messuages, lands, works, and premises known as the Stranton Iron and Steel Works, for £28,000, and he applied to the plaintiffs to 25 Eng. Rep.

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allow him to overdraw his account to an amount sufficient to enable him to purchase the said works, and they agreed to do so on the title deeds of the works being deposited with them to secure the defendant's current account. The works were purchased by the defendant, and his account at the plaintiffs' bank was overdrawn to the amount of £20,293 12s. 9d.

The defendant had ever since continued to be largely indebted to the plaintiffs on his current account, and they had recently closed the said account current by a notice in writing, and at that time the defendant's account was over-

drawn to the amount of £36,000 and upwards.

The plaintiffs now claimed to be paid what was due to them by the defendant, or in default thereof that the defendants might be foreclosed from all equity of redemption in the mortgaged premises, and might be ordered to convey such premises to the plaintiffs; or otherwise that the premises might be sold and the proceeds applied in payment of the principal, interest, and costs due to the plaintiffs.

445] \*The defendants, including the trustees under the will of Thomas Charlton, the father of the defendant, alleged that part of the £7,962 standing to the current account of R. H. Charlton at the time of the advance made by the plaintiffs belonged to the trust estate of his father, Thomas Charlton, deceased, and that the plaintiffs well knew that such was the case. They alleged that the charge of the plaintiffs upon the Stranton Ironworks was, under the circumstances, subject to a lien in favor of the trust estate of Thomas Charlton for the amount of such estate invested therein.

The witnesses examined viva voce at the hearing were the principal partner in the plaintiffs' bank and their manager They stated that they were not aware at Middlesborough. till long after the advance was made by the plaintiffs' bank to Robert Hedley Charlton, that he was one of the execu-There was an account tors and trustees of his father's will. at the bank in the names of Thomas Charlton & Co., the company being constituted of three persons, Thomas Charlton, the father, Robert Hedley Charlton, his son, and Thomas The account of Robert Hedley Charlton was opened with the bank in October, 1872, immediately before the death of Thomas Charlton, the father, which took place on the 30th of November, 1872. There was also an account opened at the bank in the names of the trustees of Thomas Charlton, the father, who were his three sons, in February, 1876, and there was a further account entered in February, 1876, in the names of Robert Hedley Charlton and Thomas Charlton, the son, who were partners.

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Robert Hedley Charlton from time to time transferred funds from the account of the firm of Charlton & Co. to his own private account—that happened during the life of the father. Either of the partners could draw on the account. The witnesses were not aware that any or either of the three sons of the testator employed the trust assets for his own purposes. There was no written memorandum upon the deposit of the title deeds of the Stranton Ironworks with

the plaintiffs.

J. Pearson, Q.C., and B. Rogers (Southgate, Q.C., with them), for the plaintiffs: The bankers cannot be held responsible for the manner in which \*the money was [446] drawn out by the different partners in this firm or by the trustees of the will of Thomas Charlton the father. was the account of the partnership of Charlton & Co., and there were the separate accounts of the sons and the account of the trustees, and all the parties in whose names the accounts stood had power to draw upon those accounts, and the bankers could not know whether the checks were properly drawn on the different accounts, and could not refuse to honor those checks; and even supposing checks were drawn upon the account of the partnership of Charlton & Co. after the death of Thomas Charlton, that would make no difference to the liability of the bankers, since it is well established that the surviving partners in a firm have a perfect right to draw upon the partnership account.

It is submitted that we are now entitled to a decree of foreclosure in respect of the Stranton Ironworks, of which there was an equitable mortgage by deposit of deeds. That we are entitled to foreclosure, and not sale, is settled by the case of James v. James (1); and whether there is or is not a memorandum in writing accompanying the deposit of deeds makes no difference. The old rule in the Bankruptcy Court was, that if you applied for a sale and you had a memorandum, you had the costs, and if you applied for a sale and had no memorandum, you did not get the costs. is the only difference. There might have been a question upon this point before the case of James v. James, but that decision has been approved of and acted upon ever since, as it was founded upon a decision of the Court of Appeal in Pryce v. Bury, not reported, but copied from the Registrar's book. A written memorandum is no higher than a parol agreement, because mortgage is only parol put on paper. Therefore the decree we are entitled to is foreclosure, not sale.

(1) Law Rep., 16 Eq., 153; 2 Eng. R., 865.

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Higgins, Q.C., and Caldecott, for the defendants, the cestuis que trust under the will of Thomas Charlton: submit that the plaintiffs, from their intimate acquaintance with all the Charltons, must have known the position in which Robert Hedley Charlton stood in respect of his father's property, and they must be taken to have had no-447] tice that the assets of the \*testator were being dealt with by the sons as trustees, and there being separate accounts of the different parties, the transfers from one account to the other were proper subjects for inquiry and investigation on the part of the bankers. It was their duty to inquire, and they ought to be held to have had notice of the fact that the assets which were being dealt with were trust assets.

Then we submit that the proper relief in respect of the Stranton Ironworks is sale and not foreclosure. All the

cases are cited in Fisher on Mortgages (1).

[Morgan, Q.C., amicus curia, referred the court to the case of Samble v. Wilson (\*), on the question as to whether a mortgagee with a deposit merely, and without any written The Master memorandum, is entitled to foreclosure or sale. of the Rolls there decided that the mortgagee who was desirous of having a sale could not get it except by consent.]

In the case of Matthews v. Goodday (\*) Vice-Chancellor Kindersley discussed the subject at some length, and the Vice-Chancellor there said his own opinion would be that there would be no right upon the mere deposit of title deeds. and nothing more, to come and ask for a legal mortgage.

The case of James v. James (') was cited before the present Master of the Rolls in Carter v. Wake (\*). There his Lordship decided that the doctrine that an equitable mortgagee by deposit of title deeds is entitled to foreclosure does not extend to a pledge of personal chattels; and in the case of Marshall v. Shrewsbury (\*), where the point was incidentally raised, Lord Justice James says this: "I have never met with a bill by an equitable mortgagor for redemption, though such a bill might probably be filed. But how could the dismissal of such a bill operate as a decree for foreclosure? The only thing foreclosed would be the right to redeem certain pieces of parchment. It may be that the plaintiff would be barred from bringing another bill to redeem those pieces of parchment, but that is all. When an equitable mortgagee files a bill to enforce his security, he does not get a simple

<sup>(1) 8</sup>d ed., pp. 509, 510.

<sup>&</sup>lt;sup>2</sup>) 5 N. R., 895.

<sup>(8) 8</sup> Jur. (N.S.), 90.

<sup>(4)</sup> Law Rep., 16 Eq., 153; 2 Eng. R., 365. (5) 4 Ch. D., 605; 20 Eng. R., 782. (6) Law Rep., 10 Ch., 250, 254; 12 Eng. R., 719.

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decree for \*foreclosure, but he gets further substantial relief. He is entitled to have a declaration that his deposit operated as a mortgage, and that in default of payment of what shall be found due the mortgagor is a trustee of the legal estate for him, and then the decree goes on to order the mortgagor to convey the estate to him." Our case is that there was a dealing with the trust estate wholly unauthorized by the trustees. It is clear that any inquiry would have led the plaintiffs to the information which we impute to them, and it is submitted that they had constructive notice of facts which, if they knew, would prevent them from being entitled to any decree except upon condition of recouping to the trust estate the sums of money in respect of which the mortgagor was accountable to the The only question therefore is, whether there was constructive notice, or express direct notice, to the Messrs. Backhouse.

Procter, for the trustee in bankruptcy of Robert H. Charl-

ton, did not oppose a foreclosure decree.

Watson, for the trustees of the estate of Thomas Charl-

ton & Co.

MALINS, V.C.: At the time this advance was made by the plaintiffs in 1874, Thomas Charlton, the father of Robert Hedley Charlton, was dead. He had died on the 30th of November, 1872. Robert Hedley Charlton had been in partnership with his father, Thomas Charlton, in very extensive business transactions. He was the surviving partner, and there was with Messrs. Backhouse & Co. a continuing account of the firm of which Thomas Charlton, the father, had been a member. It is perfectly clear, therefore, that Robert Hedley Charlton, as the surviving partner, had a right to draw upon that account, and that Messrs. Backhouse, if they had no notice of the state of the accounts between the estate of the deceased partner and the surviving partners, were under no obligation whatever to make an inquiry on the subject. I find that there were in the books two accounts— Thomas Charlton, the father, had a private account which is not called in question here at all; he also had this account of Thomas Charlton & Co. in \*which his son was a [449] The surviving partner was entitled to draw upon that account, and I repeat that Messrs. Backhouse were not called upon, nor would it have been prudent of them, to make any inquiry—they were bound to give credit to the statement that the surviving partner was a partner until the contrary was shown. They were, therefore, in my opinion, perfectly justified in honoring the checks of Robert Hedley

Charlton upon that account, unless they had express notice

that some breach of duty was taking place. It has been distinctly sworn that the plaintiffs had no notice that Robert Hedley Charlton was a trustee of his father's will when this large advance of £20,000 was made. They knew it afterwards, in 1876, but in 1874 they had no knowledge on the subject; therefore the defence so far fails, and I am bound to come to the conclusion that this advance of £20,000 was made in the ordinary course of business, without any knowledge of Messrs. Backhouse or their agents that any irregularity was being committed. If I were to assent to the suggestion which has been made on the other side, I should be striking a most severe blow at the business of bankers, which could not be carried on if they were to be affected by such transactions as these. I am therefore clearly of opinion that Messrs. Backhouse are entitled to be treated as ordinary mortgagees by deposit of the title deeds of the Stranton Ironworks, and that they must have the usual remedies of mortgagees which are here asked for.

But upon the other point raised, namely, the question whether the proper remedy of an equitable mortgagee by mere deposit of title deeds is a sale or foreclosure, upon principle I confess I never was able to see, and I do not see now, why there should be any distinction, because whether it is done by written memorandum or by a deed, they all equally result in a mortgage, and if a mortgage is created in three different ways, I cannot see any reason why the remedy of a mortgagee should not be in any case precisely the same, that is to say, if there is a power of sale it is by sale, if there is no power of sale it is by foreclosure. would be my opinion on principle, and I am happy to find I am relieved of all difficulty on the subject, because I take it to be now settled by the case of Mr. Osborne Morgan 450] referred to, Samble v. \* Wilson (1). It was there decided by Lord Romilly in this way: "That except by consent the proper decree was for foreclosure. The deposit was equivalent to an implied agreement for a mortgage."

This was formally brought before the court in the case of James v. James (\*), where the decision proceeded on the authority of a case of Pryce v. Bury (\*), which was considered to settle the question. The short note is this: "This was a bill for an account by an equitable mortgagee against the heir-at-law of the mortgagor, and for a foreclosure or sale, and the only question was whether the court ought to direct

<sup>(1) 5</sup> N. R., 395. (2) Law Rep., 16 Eq., 153; 2 Eng. R., 365. (3) Law Rep., 16 Eq., 153 n.; 2 Eng. R., 365.

Mr. W. W. Karslake, for the plaina foreclosure or a sale. tiff, stated that there were numerous cases which were easily reconcilable, but the weight of authority seemed to be in favor of Lord Eldon's view that a foreclosure was relief to which an equitable mortgagee was entitled. The Lord Justice James read the note from the Registrar's book of Pruce v. Bury on appeal to the full court, and said that that case was conclusive on the question, as appeared by that note, which ought to be reported. Decree for foreclosure accordingly." Therefore, here, upon the authority of that case and upon mature deliberation, the court decided that where there was a contract—I suppose there was no written memorandum—it does not state there was—upon the mere deposit of title deeds a mortgage is created, and the remedy of the mortgagee was foreclosure, if he thought fit to have it, and not sale. Now that proceeded upon the authority of Pryce v. Bury, which was as long ago as 1854, and which resulted in a decree for foreclosure. I consider, therefore, it is not necessary to refer to the cases cited in Fisher on Mortgages, which were cases anterior to the publication of his book in 1868, because all that of course has been overriden by James v. James, which was in 1873. I am, therefore, happy to find it is, in my opinion, now perfectly settled, certainly in accordance with what would be my view upon the subject, that the proper remedy of a mortgagee, whether created by a deposit of title deeds with a written memorandum, or without a memorandum, or by a deed, is foreclosure. Therefore, Messrs. \*Backhouse must have, in my opinion, the usual foreclosure decree in this case. It should be prefaced with "It appearing by the evidence that the balance," then there will be a statement of the balance, and the decree will be that the equitable deposit of deeds is a good and valid mortgage against all the parties defendants to the suit. think it will be for the benefit of the infants that the accounts should be waived, and as Mr. Pearson, for the plaintiffs, offers to take £36,000 instead of £36,500 2s. 8d. now due, with interest from the 1st of January, 1877, I will make a declaration to that effect.

Morgan, Q.C., said that Mr. Fisher, in the last editon of his book ('), after citing the cases before referred to, said, "The right of a depositee without an agreement to a decree of foreclosure is now well established."

Solicitors for plaintiffs: Tathams & Pym.

Solicitors for defendants: Sharp & Üllithorne; Shum, Crossman & Crossman.

(1) 8d ed., p. 510.

As to the power which one member of a partnership has to bind the firm by the giving of a promissory note, see 5 Cent. L. J., 359; 1 Am. Dec., 3, 4 note.

The fact that two persons sign a joint note is no evidence of partnership: Hopkins v. Smith, 11 Johns., 161

Where two individuals are sued as partners for goods sold to them in their business as hotel keepers, and the partnership is denied, a bond, purporting to have been executed by both defendants for the purpose of obtaining a tavern keeper's license, is admissible in evidence as tending to establish a partnership: Conkey v. Burton, 43 Barb., 435.

Each partner may bind his copartners by any contract within the scope of the copartnership business so long as the relation continues, although one of the partners at the time dissented from the agreement: Wilkins v. Pearce, 5 Den., 541, 2 N. Y., 469; National Union, etc., v. Landon, 66 Barb., 189. But see 1 Pars. on Cont. (6th ed.),

But see 1 Pars. on Cont. (6th ed.), 197 bottom p., 180 marg. p.; Graser v. Stellwagen, 25 N. Y., 315.

A member of a partnership cannot bind his copartner for transactions out of the usual scope of the business of the copartnership, nor for things which are sometimes done by it, but are of unusual or rare occurrence: Frazer v. McLeod, 8 Grant's (U.C.) Chy., 268; Graves v. Kellenberger, 51 Ind., 66; Zuell v. Bowen, 78 Ills., 234.

One partner in a non-trading partnership—i.e., lawyers—cannot bind his copartner by a bill or note drawn, accepted or indorsed by him in the firm name, even though it be for a debt of the firm, unless he has express authority therefor from his copartner, or the giving of such instrument is necessary to the carrying on of the partnership business, or is usual in similar partnerships; and the burthen is upon the party suing on such note or bill to prove such authority, necessity or usage: Smith v. Sloan, 37 Wisc., 285.

After dissolution, one partner has no authority to bind the partnership by executing commercial paper in its name: Gale v. Miller, 54 N. Y., 536; Kendall v. Reilly, 45 Tex., 20; Turnbow v. Broack, 12 Bush (Ky.), 455; Whitworth v. Ballard, 56 Ind., 279; Dunlap v. Limes, 49 Iowa, 177; Brown-

ing v. Crouse, 40 Mich., 343; Matteson v. Nathanson, 38 Mich., 377; Vallaro v. Torf, 9 Heiskell (Tenn.), 194.

But see Wilson v. Forder, 20 Ohio St. R., 89; Lloyd v. Thomas, 79 Penn. St. 68; Whitworth v. Ballard, 56 Ind., 270

Except as to one who has dealt with the firm and took such paper without notice of the dissolution: Howell v. Adams, 68 N. Y., 314.

Though such act may be ratified: Whitworth v. Ballard, 56 Ind., 279.

And if he give a firm note for a debt barred by the statute of limitations, the other is not bound thereby: Newman v. McComas, 43 Md., 70; Tate v. Clements, 16 Florida, 340.

After the dissolution of a partnership, by the death of one of its members, the choses in action of the firm constitute a trust fund for the payment of its debts; and it seems the stock in trade, and lease of the store in which it is carried on, are equally subject to that trust. The surviving partner in the performance of such trust has no power to exercise partiality between creditors, but is bound to distribute the property among them pro rata, according to the maxim that equality is equity.

A surviving partner has no right to transfer the whole property of the firm to a trustee to sell the same for the payment of the partnership debts: Loeschigh v. Addison, 3 Rob., 332.

Where there is no agreement to the contrary, each partner, after the dissolution, possesses the same authority to adjust the affairs of the concern by collecting its debts and disposing of its property as before the dissolution: Robbins v. Fuller, 24 N. Y., 570; Huntington v. Potter, 32 Barb., 300; Ruffner v. Hewitt, 7 W. Va., 585; Hammond v. Heward, 11 U. C. C. Pl., 261; Heartt v. Walsh, 75 Ills., 200; Nichells v. Mooring, 16 Florida, 76; Van Doren v. Horton, 19 Hun, 7.

But not to indorse commercial paper: Whitworth v. Ballard, 56 Ind.,

This right is not lost by the fact that the partnership debts are paid, nor, it seems, does it depend upon the state of the accounts between the partners, at all events, not as against persons having no notice of the fact: Robbins v. Fuller, 24 N. Y., 570.

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If, after the dissolution of a partnership leaving outstanding debts, which remain unpaid, an insolvent partner sells to a third person a part of the partnership property for the purpose of raising money to pay his individual debts, and the purchaser at the time of the purchase has full knowledge of the insolvency of such partner and of his object in making the sale, it will be adjudged fraudulent and void: Geortner v. Trustees, etc., 2 Barb., 625.

See Davis v. Grove, 2 Rob., 134.

A division by partners of the copartnership assets between themselves, and the transfer of such assets by the individual partners in payment of their private debts when the partnership is insolvent, is, in point of law, a fraud upon the creditors of the partnership. Such a transfer of the partnership effects is invalid as against the creditors of the firm, and the property remains partnership property, until it comes to the hands of a bona fide purchaser for a valuable and new consideration. If the person to whom the property is transferred has notice that it is partnership property, and he takes it in payment of a precedent debt

chaser: Ransom v. Van Deventer, 41 Barb., 307. See Graser v. Stellwagen, 25 N. Y., 315.

he will not be deemed a bona fide pur-

One partner has no power, without the assent of his copartner, to give to his individual creditor, in payment of an individual indebtedness due by him, a note drawn by him in the firm name, or an indorsement made by him in the firm name: Rust v. Hauselt, 41 N. Y. Superior Ct. R., 467; Hayes v. Baxter, 65 Barb., 181; Gerrey v. Cockroft, 33 N. Y. Superior Ct. R., 146; Tompkins v. Woodyard, 5 W. Va., 216.

Or firm property: Comstock v. Buchanan, 57 Barb., 127; Ruckman v. Decker, 23 N. J. Eq., 283; Stegall v. Rice, 49 Miss., 761; Caldwell v. Scott, 54 N. H., 414; Williams v. Barnett, 10 Kans., 455; Thomas v. Pennrich, 28 Ohio St. R., 55; Binns v. Waddill, 32 Gratt. (Va.), 588.

See Stokes v. Stevens, 40, Cal., 391; Tredwell v. Williams, 9 Bosw., 649; Graser v. Stellwagen, 25 N. Y., 315; Moriarty v. Bailey. 46 Conn., 592.

Moriarty v. Bailey, 46 Conn., 592.

If a firm debt is paid by individual funds, his individual creditors cannot 25 ENG. REP.

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reach a similar amount of partnership assets: Kendall v. Rider, 35 Barb., 100. See Wallace v. James, 5 Grant's (U. C.) Chy., 163.

An agreement between the payee of a note and the maker, made with the assent of the latter's partner, to apply the indebtedness of the payee to such maker and his partner in payment of a note, operates in present as a satisfaction of the note pro tanto: Davis v. Spencer, 24 N. Y., 386; Hartley v. Tatham, 1 Keyes, 226, 2 Abb. Ct. App. Dec., 383, modifying 1 Rob., 246.

But see that a somewhat similar arrangement may fall within the statute of frauds: Brand v. Brand, 49 Barb., 346, 83 How. Pr., 167; Maltier v. Allen, 3 Abb. Ct. App. Dec., 248, reversing 33 Barb., 548.

An incoming partner may undoubtedly, by agreement, become liable for debts contracted by the firm previous to his entering it, but the presumption of law is against any such liability, and requires proof to remove it: Rountz v. Holthouse, 85 Penn. St. R., 285; Guild v. Belcher, 119 Mass., 257.

Though eight evidence will be sufficient to prove an assumption by him thereof: Cross v. National, etc., 17 Kans., 336.

But when given in part for an old debt, and in part for one after he became a member, the holder may recover so much thereof as is for the new debt: Guild v. Belcher, 119 Mass., 257.

By the formation of a partnership, the firm does not become liable for the individual contracts of one of its members, or to pay his debts. Even if the firm promises to fulfil such contracts, there must be shown a new consideration to support the promise, and the individual member must be released: Goodenow v. Jones, 75 Ills., 48.

If a partner borrows money avowedly for the use of the firm, and in addition appropriates it to their use, the other partners are liable upon the principle of agency, on the score of his authority as a member of the firm to borrow money for their benefit, although he misappropriate it, and it is not devoted to the use of the firm: Tallmadge v. Penoyer, 35 Barb., 120.

See Smith v. Collins, 115 Mass., 388. Where one member of a firm made a note as maker, and upon it borrowed money:

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Held, 1. The legal presumption was that it was the note of the individual who signed, and not the note of the firm.

2. That to entitle the holder to recover in such a case against the partners, he must prove either that the money for which the note was given was borrowed on the credit of the partnership, or that it was used, when obtained, in the business of the partnership.

3. That the burthen of proof was upon the plaintiff to show that the note was discounted upon the credit of the

partnership.

4. That if the lender did not know of the partnership, or if the money was loaned on the individual credit of the maker of the note, the fact that the money was applied to the business of the firm did not create a liability on the part of the firm, or constitute the lender a creditor of the firm: National, etc., v. Ingraham, 58 Barb., 290; National, etc., v. Thomas, 47 N. Y., 15; Tallmadge v. Penoyer, 35 Barb., 120; Peterson v. Roach, 32 Ohio St., 374; Hamulton v. McIlroy, 15 Grant's (U. C.) Chy., 332; Union, etc., v. Day, 22 Heiskell (Tenn.), 413; Lill v. Egan, 89 Ills., 609.

Where two persons agree to enter into partnership, to commence in the future, and the agreement is never carried out, yet if goods be purchased by both in the name of the proposed firm, and a note given therefor under a statement that it is to commence in future, they are liable on the note as partners: Stiles v. Meyer, 64 Barb., 77.

Though mere conversation about forming a partnership will not authorize one to contract a debt binding on the firm when organized. If subsequently organized, mere knowledge of such a contraction of the debt by one will not bind the other: Gaass v.

Hobbs, 18 Kans., 500.

The borrowing by one partner on the note of the firm, is within the ordinary powers of a partner, and within the ordinary course of business: Mechanics' Bank v. Foster, 29 How., 408; Canadian, etc., v. Wilson, 36 U. C. Q. B., 9; Blodgett v. Weed, 119 Mass., 215; Wagner v. Freschl, 56 N. H., 495.

On presentation of a note in form by a partnership, and proof of the execution by one partner, it is presumptively a partnership note given in the partnership business: Vallett v. Barker, 6 Wend., 615; National, etc., v. Landon, 66 Barb., 189; Mechanics' Bank v. Foeter, 29 How. Pr., 408; Chemung Co. v. Bradner, 44 N. Y., 680; Carrier v. Cameron, 31 Mich., 373, 378, and cases cited; Littell v. Fitch, 11 Mich., 525; Canadian, etc., v. Wilson, 36 U. C. Q. B., 9; Wallace v. James, 5 Grant's (U. C.) Chy., 163; Blodgett v. Weed, 119 Mass., 215.

A bona fide purchaser or mortgagee of one partner's interest in real estate, which is in fact partnership property, will be protected; otherwise if for a precedent debt, or the grantee or mortgagee has knowledge of facts giving the firm an equity in such real estate: Hiscock v. Phelps, 49 N. Y., 97, modi-

fying 2 Lans., 106.

An accommodation indorsement, made by one member of a mercantile firm, without the assent, either express or implied, of his copartners, cannot be enforced against the latter, except in favor of a bona fide holder without notice: Austin v. Vandermark, 4 Hill, 259.

Though it is valid in favor of a bona fide holder without notice: Austin v. Vandermark, 4 Hill, 259; Stall v. Catskill Bank, 18 Wend., 467; Canadian, etc., v. Wilson, 36 U. C. Q. B., 9; Marsh v. Thompson, etc., 2 Bradwell (Ills.), 217.

Mere knowledge by one partner that another partner has given firm paper for his individual indebtedness will not render him liable thereon: Todd v. Lorah, 75 Penn. St. R., 155; Hayes v. Baxter, 65 Barb., 181; Tompkins v. Woodyard, 5 West Va., 216.

Nor can one ratify for the remainder of the firm: Marsh v. Thompson, etc.,

2 Bradwell (Ills.), 217.

One partner, without authority and for his own exclusive benefit, indorsed a promissory note made by himself in the firm name, and the indorsee took the note with full knowledge of the facts. Held, that his copartner was bound by a subsequent promise to pay the note, without any independent consideration: Com. Bank v. Warren, 15 N. Y., 577.

An assent may be implied from facts and circumstances: Gansevoort v. Williams, 14 Wend., 194; Todd v. Lorah, 75 Penn. St. R., 155; Ross v. White-

field, 86 N. Y. Superior Ct. R., 50, 56 N. Y., 640; Stokes v. Stevens, 40 Cal., 891.

But see Kemeys v. Richards, 11 Barb., 312; Hayes v. Baxter, 65 Barb., 181; Gerrey v. Cockroft, 33 N. Y. Superior Ct. R., 146.

In a suit upon a promissory note made in the name of a firm, without authority, by a retired partner, evidence is admissible that the partners had paid a judgment recovered by default upon another note made at about the same time and under the same circumstances: City Bank v. Dearborn, 20 N. Y., 244.

On proof that a note was given by one partner in fraud of the rights of his copartners, the plaintiff, in order to recover thereon, must show that he is a bona fide holder before due, for value, and without notice of the facts: Carrier v. Cameron, 31 Mich., 373, 379. and cases cited; Monroe v. Cooper, 5 Barb., 312; Kemeys v. Richards, 11
Barb., 312; Vallett v. Parker, 6 Wend.,
615; First, etc., v. Green, 48 N. Y.,
298; Catlin v. Hansen, 1 Duer, 309; Wagner v. Freschl, 56 N. H., 495; Chazourness v. Edwards, 3 Pick., 5; Holme v. Karsper, 5 Binney, 469; Beltzhoven v. Blackstock, 3 Watts, 20, 26; Smith v. Sac County, 11 Wall., 139. See Tompkins v. Woodyard, 5 West

Va., 216.
Where the maker of a note, indersed by a firm, presents the same to be discounted for his accommodation, such fact shows upon its face that it is a mere accommodation indorsement: Fielden v. Lahens, 2 Abb. App. Dec., 111, 6 Abb. Pr., N.S., 841, modifying 9 Bosw., 436, 14 Abb. Pr., 48; Gansevoort v. Williams, 14 Wend., 134; Williams, 14 Wend., 134; Williams, 14 Wend., 184; Williams, 14 Wend., 184; Williams, 14 Wend., 184; Williams, 14 Wend., 184; Williams, 184; Willia son v. Williams, Id., 146; Marsh v. Thompson, etc., 2 Bradwell (Ills.), 217.

The note of a third person was indorsed with the names of the individual partners of a firm, and then in the firm name in the handwriting of the financial partner, and discounted by plaintiffs at the request of said partner. Held, affirming the judgment of the court below, that it was for the jury to determine whether the transaction was for the benefit of the financial partner alone, and if so, whether plaintiff had constructive notice of the fact: Levan v. Hoff, 1 Weekly Notes (Penn.), 620, Supreme Court, Penn.

A surviving partner may maintain an action in his own name for a debt incurred to the partnership during its existence, without setting out the partnership, or the death of his copartner, or his survivorship: Bernard v. Wilcox, 2 Johns. Cas., 374; Lachaise v. Libby, 13 Abb., 6; McVean v. Scott, 46 Barb., 379, 1 Burr. Pr., 60, Grah. Pr. (1st ed.), 59, 60; Smith v. Barrow, 7 Term, 476; Matter of Miller, 1 Paige, 445; Murray v. Mumford, 6 Cow., 441; Cock v. Carson, 38 Tex., 284; Barlow v. Coggan, 1 Wash. Ter., N.S., 257; v. Coggan, 1 Wash. Ter., N.S., 257; Forrester v. Oliver, 1 Bradwell (Ills.), 259; Anth. N. P., 294; Case v. Abeel, 1 Paige, 393; Egberts v. Wood, 3 id., 517; Barry v. Briggs, 22 Mich., 201; Grant v. Shurler, 1 Wend., 148; Basett v. Miller, 39 Mich., 183; Loeschigk v. Addison, 19 Abb. Pr., 169; Wilson v. Nicholson, 61 Ind., 241.

But see Ditchburn v. Spracklin, 5 Esp., 81, which went off on the ground of variance as to the plaintiff being the seller, whereas the complaint should have alleged simply that defendant was indebted to plaintiff for goods sold

and delivered.

The rule is the same as to part owners of a vessel: Bucknam v. Brett, 85 Barb., 596, 13 Abb. Pr., 119, 22 How.

Though otherwise as to a partnership of lawyers, so far as unfinished business is concerned: Sterne v. Goep, 20 Hun. 896.

And as to real estate: Foster's Appeal, 74 Penn. St., 891.

A plaintiff may join a demand due him in his own right with a demand due him as a survivor; and so demands due him as survivor of two firms: Stafford v. Gold, 9 Pick., 583.

In an action by a partnership for a debt contracted with the plaintiffs and a partner since deceased, if his existence appear in the complaint, his death and the survivorship of the plaintiffs should be alleged: Holmes v. Decamp, 1 Johns., 34.

And so if goods be sold a firm, and one of them dies, assumpsit may be brought against the survivor without notice of the partnership, or of the death of one and the survivorship of the other: Goelet v. McKinstry, 1 Johns. Cas., 405; Lachaise v. Libby, 18 Abb., 6; McVean v. Scott, 46 Barb., 383; Smith v. Barrow, 2 Term, 476,

In Upper Canada it has been held, that the executor of a deceased partner in trade is tenant in common of the partnership property with the surviving partners, and the surviving partners cannot sue him in trespass for a wrongful sale and conversion against their will of the whole partnership property: Strathy v. Crooks, 2 U. C.

Q. B., 51.

We do not think this case good law. The error of the court was in determining that the survivors and the representatives of the deceased partners

were tenants in common.

Where the debtor paid the debt to the executor of the deceased partner, it was held no satisfaction to the surviving partner, who had the sole right of suing for and recovering moneys due the firm: Wallace v. Fitzsimmons, 1 Dall., 248, 250; Bilton v. Blakely, 6 Grant's (U.C.) Chy., 575.

Though the survivor has a right to collect assets of the firm, the representatives of the deceased partner has a right to inspect the books of the partnership, and to be informed of the proceedings of the survivor; and any exclusion of them in these respects will entitle them to an injunction and a re-

ceiver: Bilton v. Blakely, 6 Grant's

(U.C.) Chy., 575. See also Egberts v. Wood, 3 Paige, 517; Loeschigk v. Addison, 19 Abb. Pr., 169; Barry v. Briggs, 22 Mich., 201; Forrester v. Oliver, 1 Bradwell

(Ills.), 259.

The surviving partner is entitled to recover of the representative of a deceased partner the amount he has received in satisfaction of a partnership demand. It is no defense that he is bound ultimately to pay the partnership debts, if satisfaction cannot be obtained of the survivor. He receives the money in trust for the survivor: McCarty v. Dixon, 2 Dall., 65 note, Sup. Court of Penn.

À debt due from the plaintiff as surviving partner may be set off against a debt due from him to defendant in his own right: French v. Andrade, 6 Term, 582; Slipper v. Stidstone, 1 Esp., 48, 5 Term R., 493; and see Day's note,

Matter of Miller, 1 Paige, 445.

The personal representative of a surviving partner represents partnership assets, as well as the individual estate of his intestate: Brooks v. Brooks, 12

Heiskell (Tenn.), 12,

The surviving partner, who has become a lunatic, is, notwithstanding his lunacy, entitled by his committee to the custody and control of the partnership property, and may sue for the recovery of debts due to the partnership.

In such suit, the lunatic and his committee must be both joined as plaintiffs: Uberoth v. Union, etc., 9 Philadelphia

Rep., 83.

Assets of a partnership, in the hands of a surviving partner at his death, are so far his "personal estate" within the meaning of the general statutes, chap. 96, § 5, that the probate court may make an allowance therefrom to his widow, although the assets are insufficient to pay the partnership creditors in full: Bush v. Clark, 127 Mass., 111.

If the surviving partner has no interest in a cause of action, the representatives of a deceased one may maintain an action: Hackett v. Belden, 40 How.,

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The personal representative of a deceased partner cannot be joined as a party defendant with the surviving partner to an action for a partnership debt, where the complaint does not show plaintiff's inability to procure satisfaction from the survivor: Voorhis v. Childs, 18 Barb., 592, 17 N. Y., 354; Higgins v. Rockwell, 2 Duer, 650; Meech v. Allen, 17 N. Y., 800; Gere v. Clark, 6 Hill, 359; Wilson v. Nicholson, 61 Ind., 241; Barlow v. Coggan, 1 Wash. Ter., N.S., 257.

And if all be dead, the action should be against the representative of the survivor: Gere v. Clark, 6 Hill, 859.

Though as the objection appears on the face of the complaint, it must be taken by demurrer and not by answer:

Higgins v. Rockwell, 2 Duer, 650.

The inability to procure satisfaction by an action against the surviving partner is essential to a cause of action, either at law or equity, against the representative of the deceased partner, as well under the code of procedure as before: Voorhis v. Childs, 17 N. Y., 354; Bank v. Corlies, 1 Abb. Pr., N.S., 412, 417; Meech v. Allen, 17 N. Y., 300.

If insolvency of the survivor be alleged, it may be denied by answer: Bank v. Corlies, 1 Abb. Pr., N.S., 412.

Where one of the defendants dies

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before judgment, the action cannot be revived as a joint action against the survivor and the personal representative of the deceased, but may as separate actions: Union Bank v. Mott, 27 N. Y., 633.

See Chapman v. Foster, 15 How. Pr., 241.

Otherwise, if only one were sued and he die: Fine v. Righter, 3 Abb. Pr., N.S., 385.

Although, as a general rule, a cause of action in favor of two partners, or joint contractors, survives to the survivor, and an action upon it cannot be continued in the name of the personal representative of one deceased, nor can such representative be joined in an action; yet, where a judgment recovered by two partners has been satisfied as against one and not as against the other, and the latter dies, the action may be continued in the name of the legal representative of the latter: Hackett v. Belden, 10 Abb. Pr., N.S., 123.

A surviving partner cannot bind the estate of a deceased partner for debts incurred by him subsequent to its dissolution by the death of a member of the firm: Cock v. Carson, 45 Tex., 429.

A surviving partner is not entitled, without consent of the representatives of a deceased partner, to use the firm name in continuing the business: Fenn v. Bolles, 7 Abb. Pr., 202.

See Will. Eq., 403, marg. p.; Lewis v. Landon, 7 Simons' Chy., 421.

A surviving partner cannot bind cosurvivors by signing the firm name, without their express authority or ratification: Browning v. Crouse, 40 Mich., 343; Matteson v. Nathanson, 38 Mich., 277

A surviving partner has no right to use machinery upon his own personal account to the detriment of the estate of the deceased partner, and will be enjoined, whether the machinery be regarded as realty or personalty: Stanhope v. Kerplee, 2 Brewster (Pa.), 455.

[8 Chancery Division, 451.] V.C.M., April 12, 1878.

STACE V. GAGE.

[1878 S. 140.]

Trustees for Sale-Partition-Cestuis que Trust not necessary Parties.

In an action for sale and partition, the plaintiffs were trustees for sale of two-thirds of certain leasehold property, and the defendants were trustees for sale of the remaining third part after the death of a tenant for life. The cestuin que trust not being parties:

Held, that the trustees for sale sufficiently represented their cestuis que trust, and a sale and partition were directed without notice to the parties beneficially interested.

This case came on as a short cause.

Hannah Trindle, by her will, dated the 1st of December, 1857, gave the whole of her leasehold property equally between Thomas Gage, Joshua Gage, and Amelia Inseal, as tenants in common.

The third part given by the will to Joshua Gage became vested \*in Amelia Inseal, who, by her will, dated the [452 31st of October, 1875, gave the two-thirds of the leaseholds to the plaintiffs, James Stace and Edwin Davis, upon trust to sell and stand possessed of the proceeds as therein mentioned, and appointed the plaintiffs executors of her will.

Amelia Inseal died in 1877.

Thomas Gage, who was entitled to the remaining third

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part of the leasehold property, by his will, dated the 6th of October, 1868, after appointing the defendants, J. Gage and Charles Pettitt, executors thereof, bequeathed to his wife, the defendant, Mary Ann Gage, during her life, all his real and personal estate, and after her decease the testator directed his executors to sell all his share in the leasehold premises therein mentioned, being the leasehold premises bequeathed by the will of Hannah Trindle, and stand possessed of the proceeds upon the trusts therein mentioned.

Thomas Gage died in 1873.

The plaintiffs claimed that it might be declared that they were entitled to two-thirds of the leasehold property, and that the defendant Mary Ann Gage was entitled for life, and the defendants J. Gage and Charles Pettitt in remainder, to the said remaining equal third part of the premises. That a fair partition might be made between the plaintiffs and the other persons entitled, and that the leasehold premises might be sold and the proceeds thereof divided and distributed between the plaintiffs and the other persons entitled thereto.

The question now raised was whether the sale and partition could be effected by the trustees without the other

parties interested being before the court.

E. S. Ford, for the plaintiffs: The trustees for sale sufficiently represent their cestuis que trust. They must be treated as the actual owners of the property, and it is not necessary to have the parties beneficially interested before the court. That was decided by your Lordship under the Settled Estates Act, in In re Strutt's Trusts (1), following a case of In re Potts' Estate (1), decided by the Master of the 453 Rolls in 1866. \*These cases, however, were not followed by the present Master of the Rolls in In re Ives (1).

E. Ward, for the defendants.

MALINS, V.C.: My opinion is that the plaintiffs, who are trustees of the will of Mrs. Inseal, sufficiently represent their cestuis que trust, and the order now asked for will no doubt be for the benefit of all the parties interested.

The decree will be in the terms of the claim.

Solicitor for the plaintiff: H. J. Godden.

Solicitors for the defendants: Beaumont & Warren.

(1) Law Rep., 16 Eq., 629; 7 Eng. R., (2) Law Rep., 16 Eq., 631 n.; 7 Eng. 624.

R., 626.
(3) 3 Ch. D., 690.

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[8 Chancery Division, 453.]
V.C.M., May 1, 1878.

TAUNTON V. MORRIS.

[1874 T. 94.]

Married Woman-Equity to Settlement-Life Interest.

A married woman has the same equity to a settlement out of property in which she has a life interest only as out of property in which she has an absolute interest, and there ought to be no distinction between the two cases as regards the amount to be settled.

A QUESTION arose on a petition in this action as to the amount to be settled on Mrs. Taunton, a married woman, under her equity to a settlement, under the following circumstances:

Mr. Taunton became insolvent in July, 1861, being then in prison for debt, and was indebted to various creditors to the extent of £25,000; no assets of his estate had been discovered, and no dividend declared. The provisional assignee of the estates of insolvent debtors was the person in whom his estate was vested.

Mrs. Taunton became entitled for her life to an income of about £500 a year, with remainder to her children, under the will of her father, the testator in the cause, on the death of the widow of \*the testator in 1876. The testator's [455 will did not settle the income to her separate use.

No settlement or agreement for a settlement had been made upon or since the marriage of Mr. and Mrs. Taunton, which took place in 1846.

This suit was instituted in 1874.

The provisional assignee claimed at least half of the wife's income for the creditors of Mr. Taunton.

Mrs. Taunton claimed to have the whole of the income settled.

Evidence was given that Mr. Taunton contributed nothing, and could contribute nothing to the support of his wife.

Money amounting to about a year's income had been paid to Mrs. Taunton under an order of the court for her support, without prejudice to the present question.

Glasse, Q.C., and Langley, for the provisional assignee: The wife might be entitled to the whole if it were a case of capital, but here she is entitled to a life income only, and

ought only to have one-half, as children cannot be consid-

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ered: Tidd v. Lister('); Beresford v. Hobson('); Vaughan v. Buck('); Wright v. Morley(').

J. Pearson, Q.C., and W. Karslake, for Mrs. Taunton: The equity to a settlement is personal to the wife, and therefore attaches to a life interest no less than to an absolute interest; and the tendency of late years has been to allow the wife the whole income in all reasonable cases: Wilkinson  $\nabla$ . Charlesworth (\*); Scott  $\nabla$ . Spashett (\*); Dunkley v. Dunkley (').

A general assignee stands on a different footing from a particular assignee for valuable consideration: Re Duffu's Trust(\*); Koeber v. Sturgis(\*); Lewin on Trusts(\*); Roper's

Husband and Wife (").

\*456] Higgins, Q.C., and Crossley, and H. Fellows, supported the same view.

Glasse, in reply: Tidd v. Lister (') was not cited in Koe-

ber v. Sturgis (\*).

The law is altered as to the proportion you may give out of an absolute interest; it is not altered as to the proportion to be given out of a life income.

The arrears to this date must belong to the provisional assignee and must be accounted for: Newman v. Wilson (").

Malins, V.C.: The provisional assignee has a very small interest, for the dividend to be paid will in any case be very small; nevertheless I have now to decide whether Mrs. Taunton should have the whole or only half of her income settled upon her. Mr. Taunton's creditors have never received any money under the insolvency, and will receive nothing unless they can get a small dividend out of Mrs. Taunton's share in this suit.

The case of a general assignee differs from that of an assignee for value, for he can only take what the husband could take. The old rule was to give only one-half the income to the wife, as against her husband or his general assignees; but this has been modified in later years, and the amount has been enlarged so as to give the wife threefourths, and more lately the whole of the income, when the court considers that she requires it: Smith v. Smith (").

There is no dispute that if this had been corpus and not a life interest only, I could, in my discretion, give the whole

- (1) 10 Hare, 140; 8 D. M. & G., 857.
- 2) 1 Madd., 862. (8) 1 Sim. (N.S.), 284.
- (4) 11 Ves., 12. (<sup>5</sup>) 10 Beav., 324.
- 6) 3 Mac. & G., 599.
- (i) 2 D. M. & G., 890.

- (8) 28 Beav., 386.
- 9) 22 Beav., 588.
- (10) 6th ed., p. 613. (11) Jacob's ed., vol. i, p. 285.
- (19) 31 Beav., 34. (18) 3 Giff., 121.

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of the income to the wife, but it has been strenuously urged that as Mrs. Taunton has only a life interest, a different rule applies. But on the reason of the thing I can find no ground for such a distinction, for suppose Mrs. Taunton had been entitled to a capital sum of £10,000, I could have appropriated that sum, and ordered it to have been invested so as to give her an income of £500 a year, with remainder to her children, or to her husband's assignees if there \*should be no children, and why then should I not [456 give her the whole of her income of £500. The distinction between corpus and life estate has no doubt been taken in some cases, but I can see no reason for the distinction, and in my opinion it ought to be done away.

In Wright v. Morley (1) Sir W. Grant held, referring to Pryor v. Hill (2), where it was contended that the equity of the wife did not extend to the case of a life interest, that the wife's life interest passes to the assignees of the husband subject to the ordinary equity to a settlement. If then I might have settled £10,000 so as to give Mrs. Taunton £500 a year, with remainder to her children, why should I not give her the £500 a year for her life when the testator has himself given the children the remainder, which I should have otherwise done according to the practice of the court.

I do not think that later cases have maintained the suggested distinction between a life interest and an absolute Mr. Lewin, in his last edition (\*), says that upon principle the wife's equity to settlement ought in all cases to be the same, though he goes on to state an exception where the equity is sought to be enforced against the life Countenance has been lent to the existence of such an exception by the remarks of Vice-Chancellor Turner in Tidd v. Lister (\*), where, in my opinion, a broader view might have been taken. But Wright v. Morley, Wilkinson v. Charlesworth (\*), Scott v. Spashett (\*), and, above all, Koeber v. Sturgis ('), are authorities to show that a proper settlement should be made equally out of the life interest as out of the absolute interest of the wife; and Mr. Jacob, in his edition of Roper's Husband and Wife (\*), is of the same opinion, that the wife ought to be allowed a proper maintenance out of her life interest.

Now, therefore, considering this is a question between the wife (who is admitted to be entitled to some equity to a set-

<sup>(1) 11</sup> Ves., 12. (2) 4 Bro. C. C., 139.

<sup>(3) 6</sup>th ed., p. 614. (4) 10 Hare, 140; 8 D. M. & G., 857.

<sup>(5) 10</sup> Beav., 324. (6) 3 Mac. & G., 599.

<sup>(†) 22</sup> Beav., 588. (\*) Page 285.

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tlement) and the general assignee of the husband, why should I not give her the whole of the income? The wife was married fifteen years \*before the insolvency, and she only became entitled in possession to this property in 1876-eighteen years after the insolvency; and under all the surrounding circumstances, I come to the conclusion that she is entitled to have the whole life estate settled on her. And I also hold that her right accrued from the institution of the suit in 1874, and that she is entitled to the arrears of income which I have ordered to be paid out to her for her support.

Solicitors: Crowdy & Son: Twyford: Petch.

[8 Chancery Division, 460.] V.C.B., May 4, 1878.

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\*In re Croughton's Trusts.

Married Woman-Separate Use-Restraint upon Anticipation-Bequest of Share of Residue.

Testatrix bequeathed to a married woman by name, describing her as married, a reversionary share of a fund of mixed real and personal estate, expectant on a life interest. The will declared that every gift thereby made to a married woman should be for her separate use, without power of anticipation, and that her receipts alone should be good discharges for the same. The tenant for life died in the lifetime of the testatrix, who nevertheless did not alter her will.

The married woman's share of the residue being now represented by a sum of cash standing in court, uninvested, upon petition by the married woman to have the cash paid out to her, upon her separate receipt:

Held, that she was so entitled.

In re Ellis Trusts (1) observed upon.

Sarah Crooke Croughton, widow, by her will, dated the 15th of June, 1871, devised all her real estate to the use of trustees upon trust for sale, and bequeathed all her personalty to the same trustees upon trust to convert such parts thereof as should not consist of money, and declared that the trustees should, out of the moneys so to arise and the ready money of which she should be possessed at her death, pay her funeral and testamentary expenses, debts, and legacies, and should stand possessed of "the residue of the said trust moneys," upon trust to invest the same in specified securities, and pay the income to testatrix's sister, Elizabeth Mary Jane Jones, for life; and after her death, upon trust "to divide and pay the said residue of the said trust moneys between and unto the children of my said sister, namely, my nephew William Chadwick Jones and my

<sup>(1)</sup> Law Rep., 17 Eq., 409; 9 Eng. R., 611.

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niece Mary Jane, the wife of Robert Halson, equally, share and share alike, as tenants in common, if they shall be living at the death of my said sister." Testatrix then made certain provisions in the event, which did not happen, of the death of either of her said nephew and niece during the lifetime of her sister; and the will contained the following

proviso :-

\*"And I hereby further declare my will to be, that [46] every gift, devise, bequest, or provision hereby given, devised, bequeathed or made to or for any woman under or by virtue of this my will, is so given, devised, bequeathed, or made to her for her sole and separate use independently and exclusively of any husband with whom she may at any time be married, and free from his debts, control, interference or engagements, and so that she shall not have power to deprive herself of the benefit thereof by sale, mortgage, charge or otherwise in the way of anticipation, and that her receipt alone, notwithstanding her coverture, shall be a sufficient discharge for the same."

Testatrix's sister, Elizabeth M. J. Jones, died on the 13th

of September, 1872.

On the 16th of June, 1874, the testatrix died, without having altered or revoked her will, and leaving her nephew Chadwick Jones, her niece Mary Jane, the wife of Robert Halson, surviving.

The clear residue of the testatrix's estate had been ascertained, and one moiety thereof was now represented by a

sum of £2,888 3s. cash, standing in court, uninvested.

The petition was presented by Mary Jane Halson, by her next friend, praying that the sum of £2,888 3s. cash, so standing in court as above mentioned, or the residue thereof after payment of costs, might be paid to a person therein named "as her attorney, and for her sole use"; or, in the alternative, that the same residue might be invested and the income of the investment paid to the petitioner for life, or until further order.

The petition stated that the petitioner was living apart from her husband, but this fact was not relied upon as afford-

ing any ground for the prayer of the petition.

It further stated that the petitioner's husband would, if necessary, give up any claim to the sum in court.

Service on the husband of the petition and of the order to attend was proved; and it was in evidence that the husband had signed a declaration dated the 19th of March, 1878, whereby he consented that an order should be made in the terms of the first alternative of the prayer, and instructed

petitioner's solicitor to consent on his behalf to such an order being made.

462] \*Cracknall, for the petitioner: The only question is whether the clause in the will restraining anticipation by the wife has any application to the gift to her of a share of mixed residue, which is equivalent to a gift of so much cash. The share does, in fact, at this moment, consist of cash.

The distinction, in this respect, between a gift of consols, as being of a fund producing income, and a gift of something which does not produce income, was recognized by the Master of the Rolls in *In re Ellis' Trusts* ('), who expressly left this particular case open for future decision; and it is believed the point has never been decided.

It was glanced at in *In re Sykes' Trusts* (\*), and in *Cooper* v. *Macdonald* (\*), but not settled. The former authority and others were brought before the notice of the Master of

the Rolls in In re Ellis' Trusts.

Here, it will be observed, there is no direction to invest which could apply to this fund—no distinction between income and capital—no mention of income whatever. It is submitted that the fetter of restraint upon anticipation—itself an anomaly and an exception to the power of disposition over property which the law geneally permits to every owner—cannot apply to what this is, namely, the bequest of a sum of money.

Robert K. Rodwell, for the respondents, the trustees of the will: In Re Sarel (') it seems to have been decided by Lord Hatherley, when Vice-Chancellor, that the restraint upon anticipation would attach to a sum of money bequeathed to the separate use of a married woman. The case was mentioned in In re Ellis' Trusts, but the Master of the Rolls made no observation upon it. The rule as to real estate is well established, namely, that a devise in such terms as these would give the married woman an estate for life, with power of appointment by will. The Master of the Rolls said he saw no reason why that rule should not apply to income-producing funds. Accordingly, there seems no rea-463] son \*why this sum of money should not be invested, and then the ordinary rule would apply as of course.

Cracknall: In Re Sarel (\*) there appears to have been a contest between the husband and the wife. Here, as a matter of fact, the husband consents, although, in our view, his

<sup>(1)</sup> Law Rep., 17 Eq., 409; Eng. R., (5) 7 Ch. D., 288; 23 Eng. R., 581. (4) 4 N. R., 321; 10 Jur. (N.S.), 876.

<sup>(2) 2</sup> J. & H., 415.

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consent is not necessary. We thought it necessary, however, to show that he has had notice of the petition.

BACON, V.C.: The case undoubtedly is not without diffi-

culty.

The decision of the Master of the Rolls in *In re Ellis'* Trusts (') seems to have gone upon the fact that the gift there was a gift of a sum of consols producing income. In the case before Vice-Chancellor Wood, the gift seems to have been one of a sum of money.

Now the gift here must be considered as equivalent to a gift of a sum of money. The testatrix has made one residuary fund of all her real and personal estate. She intended to provide for her sister, Elizabeth Mary Jane Jones, and accordingly she directs her trustees to invest the residue, and pay the income of the investments to Elizabeth Jones for life. But she gives no other direction to invest. Upon the death of Elizabeth Jones, the trust is, "to divide and pay the said residue between and unto the children of my said sister, namely, my nephew William Chadwick Jones, and my niece Mary Jane, the wife of Robert Halson, equally, share and share alike, as tenants in common." How can that trust be properly executed except by realizing the residue, and handing over the corpus to Mary Jane Halson and her brother? In this case the gift is a gift of a sum of money.

The Master of the Rolls says (\*) he is not at all certain that the distinction between alienation and anticipation was brought before the mind of the Vice-Chancellor in *In re Sykes' Trusts* (\*). I confess I do not quite follow that—I do not see the difference between anticipation and alienation. In this instance the testatrix \*goes on to direct: [His [464 Lordship proceeded to read the above clause as to the gifts to married women being to their separate use, without anticipation, and that their receipts should be sufficient discharges; and continued:] A sufficient discharge for what? For the payment of this sum of money, which is what this

share of residue really comes to.

As to the statement in the petition that the husband and wife are living apart, I can pay no attention to that. For anything that appears, they may have separated amicably, in order that this fund may be handed over to the wife, and the husband get the benefit of it.

But such an order as is now asked for ought not to be made without the knowledge of the husband. Whether he

<sup>(&#</sup>x27;) Law Rep., 17 Eq., 409; 9 Eng. R., 611. (\*) Law Rep., 17 Eq., 411; 9 Eng. R., 613. (\*) 2 J. & H., 415.

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consents or not, it is quite right that he should be served, as in this instance he has been served, with notice of the petition.

I think the petitioner is entitled to this sum of cash. No declaration is necessary: there will simply be an order consistent with the terms of the first alternative of the prayer of the petition.

Solicitors: Alfred Peachey; Ford, Lloyd & Bartlett, agents for York, Newmarket.

## [8 Chancery Division, 464.] V.C.B., May 18, 1878.

### In re Patent Steam Engine Company.

Company—Winding-up Petition—Who may present—Contributory—Companies Act, 1862, s. 82; Companies Act, 1867, s. 40.

A petition for winding up a company may be presented by persons who have obtained a decree of the court ordering the company to allot them shares and to register them as shareholders, although their names are not on the register at the time of the presentation of the petition.

[8 Chancery Division, 467.] V.C.H., March 1, 1878.

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### \*RISHTON V. WHATMORE.

[1878 R. 133.]

Vendor and Purchaser—Specific Performance—Sale by Auction—Conditions of Sale, Omission of Reference to, in Auctioneer's Book—Statute of Frauds.

At a sale by auction subject to conditions, the auctioneer entered in his sale book the names of the vendor and purchaser, the subject-matter of the sale, and the amount of the purchase-money, but omitted, in the entry, to embody or make any reference to the conditions of sale. There was no other memorandum or contract in writing: Held, that there was no sufficient contract in writing within the Statute of Frauds, and specific performance refused as against the purchaser.

This was an action by a vendor for the specific performance of a contract for sale. The property, which consisted of the Castle Inn at Kidderminster, was put up for sale by auction, subject to particulars and conditions of sale. At the sale the defendant Mrs. Whatmore was the highest bidder, and she was declared by the auctioneer to be the purchaser; but when he asked her after the conclusion of the biddings to sign the memorandum at the foot of the conditions of sale, she declined to do so, saying that she had not with her the money to pay the deposit, but would bring it the next day. She subsequently, however, declined to sign any memorandum or agreement, and refused to complete the

purchase. This action was then brought, and the defence was that there was no sufficient contract or memorandum signed by the purchaser within the Statute of Frauds. The plaintiff relied upon the entry which the auctioneer had made in his sale book at the time of the sale. This entry was headed "Castle Inn, Park Lane, belonging to Robert Rishton," and it gave the name of Mrs. Whatmore as the highest bidder, and the sum bid by her, viz., £960, but it contained no reference whatever to the particulars or conditions subject to which the sale was made.

Dickinson, Q.C., and G. Harris Lea, for the plaintiff: The vendor by appointing the auctioneer to sell, and the bidder by the act of bidding, respectively constitute the auctioneer their agent; the writing of the bidder's name by the auctioneer in his book is a signature sufficient to bind the bidder within the Statute of \*Frauds, and specific performance of a contract so constituted has been enforced: White v. Proctor (1); Kemeys v. Proctor (2). Here the entry in the auctioneer's book comprised the names of the vendor and the purchaser, the subject-matter of the contract, and the price to be paid, and nothing more is requisite: Williams v. Lake (\*); Blagden v. Bradbear (\*).

Hastings, Q.C., and Cottrell, for the defendant: The sale was made subject to particulars and conditions which are neither embodied in, annexed to, or in any manner referred to in or connected with the entries in the auctioneer's book. If the entries in the book constituted any contract at all, it was an open contract, and therefore one different from the only contract which could have been constituted at this There was accordingly no memorandum or contract in writing sufficient to satisfy the Statute of Frauds and to entitle the plaintiff to specific performance: Peirce v. Corf (\*);

Hinde v. Whitehouse (°). Dickinson, in reply.

HALL, V.C.: The fallacy of the plaintiff's case is, that he seeks to enforce a contract contained in an entry in an auctioneer's book, which entry leaves out the conditions of sale, which are an essential part of the contract. It is plain upon the authorities, such as the cases of Kenworthy v. Schofield (') and Peirce v. Corf, that it is impossible to use an entry in an auctioneer's book for the purpose of proving a contract for sale within the Statute of Frauds, unless such

<sup>(1) 4</sup> Taunt., 209. (2) 1 Jac. & W., 350; 3 V. & B., 57. (2) 2 E. & E., 349.

<sup>(4) 12</sup> Ves., 470.

<sup>(5)</sup> Law Rep., 9 Q. B., 210. (6) 7 East, 558; Dart, V. & P., 5th ed.,

p. 221.

<sup>(1) 2</sup> B. &t. C., 945.

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entry comprises such a reference to the conditions of sale subject to which the property was sold, as to identify them, upon production, as being the conditions mentioned in the entry.

The action must be dismissed with costs.

Solicitors: J. A. Talbot, for W. H. Talbot, Kidderminster; F. T. Girdwood, for W. A. Crowther, Kidderminster.

As to the validity of memoranda, by auctioneers, under the statue of frauds, see 15 Eng. Rep., 421 note; 18 Eng. Rep., 320 note; Bishop on Contracts, 83 333-7.

Si 383-7.

Where a contract for the sale of goods rests wholly in parol, and no part of the purchase-money has been paid, a delivery of the goods to and acceptance thereof by the vendee being relied upon to take the sale out of the statute of frauds, the same person cannot act as agent of both parties; that is, he cannot claim to act as the agent of the seller to negotiate the sale, and the agent of the buyer to receive and accept the goods: Caulkins v. Hellman, 14 Hun, 330.

An auctioneer was instructed to sell land in lots by auction for three defendants, and after selling some of the lots, announced in the presence of two of the defendants, that if any one wanted to buy he should come to his office and he would be prepared to treat for the purchase of the balance.

Plaintiff purchased a lot at private sale from the auctioneer, and a memorandum of the transaction was signed by the auctioneer and the purchaser. Held, that even assuming an acquiescence of the two defendants, who were present at the invitation given by the auctioneer, binding upon themselves and the other defendant, yet, as that invitation was only to come to his office where he would be prepared to treat as to the balance of the lots, the acquiescence did not give him any authority to bind the defendants by a private sale: Hart v. Prior, 1 Russell & Chesley (Nova Scotia), 53.

In order to make an auctioneer's memorandum valid under the statute of frauds, the conditions of the sale must, in some way, be made a part of such memorandum: Megard v. Molley,

L. R., 2 Ir., 530.

That the memorandum, under the statute of frauds, must be complete in itself, see note to Chattock v. Muller, ante, p. 210.

[8 Chancery Division, 469.]

FRY, J., Feb. 28; March 1, 2, 1878.

# 469] \*Davies v. London and Provincial Marine Insurance Company.

[1877 D. 164.]

Surety—Contract—Concealment—Disclosure—Change of Circumstances—Illegal Contract—Interference of Court.

Where parties are contracting, either of them, unless he is under a duty to the other, may keep silence even as to facts which he believes would be operative on the mind of the other; if, however, one of them has made a statement which he believes to be true, but which in the course of the negotiation he discovers to be false, he is bound to correct his erroneous statement.

In some cases, such as contracts between solicitor and client, there is a duty to make entire disclosure. In others, such as contracts of partnership, everything material must be disclosed. There is no such duty in the case of a contract of sure-

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tyship, but nevertheless very little said which ought not to have been said, and very little omitted which ought to have been said, will suffice to avoid the contract.

The officers of a company, believing that the retention of money by one of their agents amounted to felony, directed his arrest. Certain friends of his came to the officers of the company and proposed to deposit a sum of money by way of security for any deficiency. On the same day the company was advised that the acts of the agent did not amount to felony, and the directions for the arrest were withdrawn. Later in that day the friends of the agent had a second interview with the officers of the company, and agreed to deposit a sum of money as security for his defaults, no mention being made of the withdrawal of the directions for the arrest. The sum of money was afterwards deposited with trustees on an agreement for the security of the company:

Held, that the change of circumstances ought to have been stated to the intending sureties, and that the agreement must be rescinded and the money returned to

the sureties:

Held, that even if the agreement was illegal as compounding a felony, the court would interfere in a case where the money was actually in the hands of trustees, and pressure had been exercised.

On the 30th of June, 1874, one J. T. Evans, who had previously been manager at Liverpool of a branch office of the London and Provincial Marine Insurance Company, and had had power to issue policies, became their agent at a salary; he was thereafter to submit all proposals for insurances to the office of the company in London, where the proposals were to be approved of or refused, and whence the policies were to be issued. In April, 1876, the \*company discovered that Evans had issued a policy in the name of the company without their authority and without accounting to the company for the premiums. Major Daniell, the secretary of the company, thereupon went to Liverpool, and finding that there were other similar cases, after consulting with Mr. Burn, the solicitor of the company, gave orders to detectives to arrest Evans if he was found. On the 14th of April Mr. Gee and Mr. Humphreys, friends of Evans's, called upon Major Daniell and pressed for an arrangement, which he refused to entertain, stating that he could not release the orders for the arrest, and referring them to Mr. Burn. On the 15th of April Mr. Gee and Mr. Humphreys called on Mr. Burn, who, amongst other things, said that he would not be a party to compounding a felony, but that there were two ways of looking at things, the civil and the criminal. in that day Mr. Burn had a conference with counsel in London, who gave his opinion that Evans could not be charged either with embezzlement or as a fraudulent bailee. this the instructions for the arrest of Evans were withdrawn. Still later on that day Mr. Gee had a second interview with Mr. Burn, who said that if Evans was prepared to deposit a sum of money, Mr. Burn would advise the company to take it as a security and to go into accounts with Evans, but nothing was said as to any agreement not to prosecute Evans,

25 Eng. Rep.

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nor did Mr. Burn say that in his opinion any criminal offence had been committed, though he spoke of embezzlement; and on Mr. Gee saying, "You will take care not to arrest Evans before Tuesday," Mr. Burn said, "Certainly not." On the 18th of April, 1877, Mr. Gee, Mr. Humphreys, and the plaintiff, J. E. Davies, another friend of Evans's, came to Mr. Burn's office, and arranged that £2,000 should be deposited in a bank in the names of Major Daniell, Mr. Borrodaile, and Mr. Davies. The money was accordingly deposited, and an agreement expressed to be made between the company and Evans was drawn up and signed by Davies. The terms were that Evans should forthwith account to the company for all moneys due by him to the company, and indemnify the company in respect of certain policies of insurance and premiums received by him without having submitted the proposals to the company; that the sum of £2,000 should be deposited in the names of J. Borrodaile, J. L. \*Daniell, and J. E. Davies, who should hold it as collateral security, in trust (a) to pay certain expenses, (b) to pay certain re-insurances, (c) to indemnify the company. (d) to secure to the company the payment of all premiums received by Evans and not hitherto paid as therein mentioned. (e) subject to compliance with the above terms and to all the aforesaid payments being made, the £2,000 or the balance thereof, to be paid to Mr. Davies; this arrangement not to prejudice or delay the company in any proceedings they might think proper to take for an account and recovery of moneys due or to become due from Evans to the company as agent for the company.

A large sum of money remained due from Evans to the company, and the company brought an action in this court against Davies and Borrodaile claiming to have the £2,000 paid to them. The action came on for trial before Mr. Justice Fry in July, 1877, the principal defence set up by Davies being that the agreement of the 18th of April was illegal, as intended to compound a felony, and could not In the course of the examination of the witbe enforced. nesses it came for the first time to the knowledge of Davies and his friends that before the agreement was made and the money deposited, the company had been advised that Evans could not be prosecuted for felony, and had withdrawn the instructions for his arrest. It further appeared that part of the £2,000 was obtained by or through other friends, and that part was obtained or met by Evans himself. At the end of that trial Mr. Justice Fry expressed an opinion in favor of the company; but his Lordship directed the action to stand

over, giving Davies leave to bring an action to have the

agreement of the 18th of April cancelled.

Davies accordingly brought an action against the company, Borrodaile, and Daniell, alleging that Mr. Burn, on behalf of the company, had concealed the facts, and had deliberately allowed Evans's friends to continue in the belief that if the £2,000 was not deposited the company were in a position to arrest and criminally prosecute him; and that Davies was induced to act as he did by such pressure and for such consideration alone. And the plaintiff claimed to have the agreement cancelled and the £2,000 paid to him.

The two actions now came on together. Witnesses were \*examined on both side, and the effect of the evi- [472]

dence is stated above, and in the judgment below.

Aspinall, Q.C., North, Q.C., and Romer, for the plaintiff: The company knowingly left Davies under the impression that criminal proceedings would be taken against Evans, and thus induced Davies to deposit this money, which he is therefore entitled to have returned, and the agreement must be rescinded: Hill v. Gray('). That case was not objected to by Lord Chelmsford in Peek v. Gurney('); Keates v. Earl Cadogan('). Hill v. Gray was not referred to in the judgments in Smith v. Hughes('). Turner v. Harvey(') shows the effect of anything which misleads. Pulsford v. Richards('), Lee v. Jones('), and Smith v. Harrison('), shows what is the law.

There was a threat of criminal proceedings used in order to extort money, and such a contract cannot stand: *Traill* v. *Baring*(\*); *Williams* v. *Bayley*(''); *Reynell* v. *Sprye*(''). Nor can an agreement to compound a felony be valid: *Osbal*-

diston v. Simpson (").

Higgins, Q.C., Poland, and W. W. Karslake, for the defendants: In Williams v. Bayley there was a pressure on the persons who gave the security, but there was none here. The principles as to principal and agent do not apply to the case of suretyship, which is more like the case of vendor and purchaser, and is of the careat emptor class: Leake on Contracts ("); Hamilton v. Watson ("). The doctrine laid down in Carter v. Boehm (") has been questioned,

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(1) 1 Stark., 484.
(2) Law Rep., 6 H. L., 877, 891; 8 Eng.
R., 1.
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<sup>(\*) 10</sup> C. B., 591. (\*) Law Rep., 6 Q. B., 597. (\*) Jac., 169.

<sup>(6) 17</sup> Beav., 87. (1) 17 C. B. (N.S.), 482.

<sup>(&</sup>lt;sup>6</sup>) 26 L. J. (Ch.), 412. (<sup>9</sup>) 4 D. J. & S., 318. <sup>10</sup>) Law Rep., 1 H. L., 200.

<sup>(10)</sup> Law Rep., 1 H. L., 200. (11) 1 D. M. & G., 660. (12) 13 Sim., 513.

<sup>(15)</sup> Page 203. (14) 12 Cl. & F., 109. (15) 8 Burr.; 1905, 1909,

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and certainly does not apply to guarantees: Greenfield v. Edwards('); Pledge v. Buss('); Wythes v. Labouchere('). 473] The utmost is that Mr. Burn did not say that \*it was doubtful whether Evans's conduct was actually criminal; and is silence in such a case so fraudulent as to deprive us of the benefit of a contract actually completed? Mr. Burn was under no duty to Evans or his friends, and they were at arm's length. Turner v. Harvey (') and Smith v. Harrison (\*) were clear cases, but unlike this. This is not an executory contract, but the court is asked to set aside a completed transaction: Story on Contracts (\*). There is an actual trust as to this £2,000, and the court must decide what is to be done with it, whether the transaction was legal or not: Sheppard v. Oxenford ('). Some of the money was found by Evans, and what right can this plaintiff have to money which belongs to a man who was indebted to the company? It is clear that the fund cannot be paid to this plaintiff. On his own showing, he was trying to compound a felony whilst the agents of the company were only anxious to get security for what was due to the company. Thomson v. Thomson (\*), Farmer v. Russell (\*), and Williams v. Bayley ("), show what agreements are illegal. But in fact there was no felony, and the agents of the company were acting with perfect propriety. They made no misstatement and concealed nothing. At first they did think that Evans had been guilty of felony, and said so, and they then refused to compound it. They afterwards were advised there was none, and then they took the security which was offered.

FRY, J.: I have now before me two actions, one by the London and Provincial Marine Insurance Company against Davies, and another by Davies against the London and Provincial Marine Insurance Company and other defendants. The question which I have to determine is with regard to a sum of £2,000 paid into a joint account under the circumstances which I am about to mention. [His Lordship then stated the facts of the case, and that he found as a fact that during the interview in the morning of Saturday the 15th of April there had been a belief common to both con-474] tracting \*parties that there was at least a probable cause for the prosecution of Evans, and that it was the intention of the company to prosecute; that there had been a reliance upon a third fact, namely, the fact that the police

<sup>(1) 2</sup> D. J. & S., 582.

<sup>(°)</sup> Joh., 662. (<sup>8</sup>) 3 De G. & J., 598.

<sup>(4)</sup> Jac., 169. (5) 26 L. J. (Ch.), 412.

<sup>(6)</sup> Page 619, § 649. (¹) 1 K. & J., 491.

<sup>(8) 7</sup> Ves., 470. (9) 1 B. & P., 296.

<sup>(10)</sup> Law Rep., 1 H. L., 200.

had instructions to arrest Evans upon that charge; and that all those three things were known by Mr. Burn on behalf of the company to be operating upon the minds of the persons with whom he was negotiating. But in the time between the two interviews all those things had been changed, and the question was whether it was right to allow the pressure which had been exerted upon the minds of one of the negotiating parties to remain operative after the circumstances had entirely changed. Upon the whole evidence his Lordship had come to the conclusion that nothing was said or done at the second interview which could have induced or did induce Mr. Gee to believe that those circumstances were changed, and that Mr. Burn must have known at the close of that interview that that was the state of mind of Mr. Gee, and that therefore the pressure was still operative. His

Lordship then continued:

The state of facts to which I have referred has given rise to an elaborate argument upon the duty of Mr. Burn to make disclosures under the circumstances which existed. The law upon that point seems to me to stand very much in this position. Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there was a duty to disclose, to show that the duty existed. Now undoubtedly that duty does in many cases exist. In the first place, if there be a pre-existing relationship between the parties, such as that of agent and principal, solicitor and client, guardian and ward, trustee and cestui que trust, then, if the parties can contract at all, they can only contract after the most ample disclosure of everything by the agent, by the solicitor, by the guardian, or by the trustee. The pre-existing relationship involves the duty of entire disclosure. In the next place, there are certain contracts which have been called contracts uberrima fidei where, from their nature, the court requires disclosure from one of the contracting parties. Of that description there are well known instances to be found. One is a contract of \*partnership, which requires that one [475] of the partners should disclose to the other all material So in the case of marine insurance, the person who proposes to insure a ship or goods must make an entire disclosure of everything material to the contract. Again, in ordinary contracts the duty may arise from circumstances which occur during the negotiation. Thus, for instance, if one of the negotiating parties has made a statement which

is false in fact, but which he believes to be true and which is material to the contract, and during the course of the negotiation he discovers the falsity of that statement, he is under an obligation to correct his erroneous statement; although if he had said nothing he very likely might have been entitled to hold his tongue throughout. So, again, if a statement has been made which is true at the time, but which during the course of the negotiations becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the change of circumstances.

It has been argued here that the contract between the surety (for in fact Davies was a surety for Evans) and the creditor, is one of those contracts which I have spoken of as being uberrimæ fidei, and it has been said that such a contract can only be upheld in the case of there being the fullest disclosure by the intending creditor. I do not think that that proposition is sound in law. I think that, on the contrary, that contract is one in which there is no universal obligation to make disclosure, and therefore I shall not determine this case on that view. But I do think that the contract of suretyship is, as expressed by Lord Westbury in Williams v. Bayley (1), one which "should be based upon the free and voluntary agency of the individual who enters into it." I think that principle especially applicable here, because there is no consideration in this case, as in many cases of suretyship, for the contract so entered into; and therefore I think, to use the language of Lord Eldon in Turner v. Harvey ('), it is a contract in respect of which a very little is sufficient. Very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being It is one, furthermore, in which I think that everything like pressure used by the intending creditor will have 476] a very serious effect on the \*validity of the contract; and the case is stronger where that pressure is the result of maintaining a false conclusion in the mind of the person pressed.

Now, to apply those observations to this case, it will have been seen, from what I have already said, that I think the payment of money into the bank on the 18th of April was produced by what had been said by Major Daniell and by Mr. Burn at the first interview on the 15th of April; that it was produced by the belief that the company had a probable cause for prosecution; by the belief that, as a matter of

<sup>(1)</sup> Law Rep., 1 H. L., 200, 219.

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fact, they did intend to presecute; by the belief that the police were instructed to arrest Evans; and those things having been stated at the earlier interview of the 15th, it was, in my opinion, the duty of Mr. Burn to state at the second interview that those facts no longer existed. I think that the language in which he assented to and upheld the erroneous impression of Mr. Gee by speaking of Evans as a person who had embezzled, and by saying that the police should not arrest Evans until Tuesday, were sufficient circumstances in themselves to render it impossible that the payment of money produced by that pressure and by those representations should be valid. I think there was that little which is quite enough to prevent the contract from being upheld.

It is said, in answer to this line of argument, that the representations in this case did not induce the contract, and that if there was dolus malus, it was not dolus malus of which you could predicate that it was dans locum contractui. Now, I do not think that that view is tenable. It is said, no doubt, that Evans was supposed to be a rich man, and that Evans was not believed by his friends to have committed this offence. That may have been their state of mind when they began the negotiations. It certainly was not their state of mind on the 14th, still less was it their state of mind at their first interview on the 15th, and I think their state of mind was well known and appreciated

by Mr. Burn. It is further to be considered whether this agreement is not void upon another ground, namely, that these proceedings were an attempt to stifle a prosecution. Now, I think that it was so understood by Mr. Gee and Mr. Humphreys, and that Mr. Burn understood that they so understood it, and that he believed that \*they considered themselves [477] to be contracting for that purpose. I am very much inclined to think that would be enough to render the contract obnoxious to the well known rule of law which makes a contract for the stifling of a prosecution void on grounds of public policy. But whether that be so or not, I think the contract is in this dilemma—either it was a contract to stifle a prosecution and is bad on that ground, or it was a contract produced by the belief that a prosecution was to be stifled when no prosecution was contemplated, and therefore the contract was produced by a misrepresentation, and on that ground also cannot stand.

A further argument adduced on behalf of the company is this. It is said that, assuming the contract to be illegal,

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Davies was equally a party to that illegal contract, and that therefore the court will stay its hand, and then the maxim melior est positio defendentis will prevail. But, in the first place, there is great difficulty in applying that principle to a case where money has been placed in medio, and where the court must do something with it, or else leave it to be locked up forever.

In the next place, it appears to me to be clear that illegality resulting from pressure and illegality resulting from an attempt to stifle a prosecution do not fall within that class of illegalities which induces the court to stay its hand, but are of a class in which the court has actively given its assistance in favor of the oppressed party, by directing the money to be repaid. The case of Williams v. Bayley (') appears to me a sufficient authority for that proposition, and therefore I do not think that that objection can prevail.

It appears, however, that a portion of the £2,000 found by Davies was ultimately met by certain bills of Evans, or was found by Evans, and it has been suggested, perhaps as much by myself as by counsel for the company, that that created a difficulty in the way of the plaintiff. I do not think that that objection can be maintained. I think that if the agreement was void on the grounds I have referred to, independently of any question with regard to contribution, the mere fact of there being a subsidiary arrangement under which Evans was to indemnify Davies to a certain extent, cannot make the transaction valid. If the company had dealt 478] \*with Evans direct it might have been one thing, but as the company were pressing Evans's friends and coming to an agreement with them, which I hold to be illegal, the mere fact that Evans's friends had dealt with him will not, in my opinion, validate the agreement. Furthermore, the fact that Davies had, subsequently to signing the agreement and depositing the money, obtained security from Evans for a part of the amount, will not, I think, stand in his way, because it is evident from the facts before me that at the time when he did so he was not in full possession of the grounds upon which he has now come to seek relief—in fact, he never was fully informed of the grounds upon which he now maintains his case until the trial of the first action. It appears to me, for the reasons I have stated, that the contract cannot be upheld, and that it must be rescinded.

I have one other observation to make, which is, that, although I have been obliged to hold that this contract is affected with illegality and cannot be maintained, it does Fry, J. Davies v. London and Provincial Marine Insurance Co. 1878

not appear to me a case in which there is any slur upon the personal conduct of any of the persons concerned. Major Daniell and Mr. Burn were acting under circumstances of great difficulty. They had to protect not merely the interests of the company with regard to the prosecution of their agent, but also the financial interests of the company; and if they went wrong, as I think they did, they went wrong under circumstances which rendered their conduct very excusable.

Declare that the agreement of the 18th April, 1877, ought to be rescinded. Let the £2,000, and any accumulations thereon, be paid to Davies and the friends of Evans who advanced the money, they being joined with Davies as plaintiffs by amendment. Dismiss the first action with costs, except the costs of the hearing, which are to be paid by Davies: the defendants in the second action to pay the costs of that action.

Solicitor for plaintiff: J. H. Lydall, agent for T. & T. Martin, Liverpool.

Solicitors for defendants: Crosley & Burn.

The creditor must make a full, fair and honest communication to the surety of all circumstances connected with the transaction to which the suretyship is to be applied, which are calculated to influence the discretion of the surety in entering into the required obliga-tion: Owen v. Homan, 8 Macnaghten tion: Owen v. Homan, 3 Macnaghten & Gordon, 878, and cases cited in Mr. Perkins's note, Little, Brown & Co.'s ed.; 17 Albany L. J., 840; 2 White & Tudor's Lead. Cas. in Eq., p. 1871.

Canada, Upper: Cushin v. Perth, 7 Grant's Chy., 340.

English: Owen v. Homan, 3 Macnaghten & Gord., 878; Small v. Currie, 2 December 102.

2 Drewry, 102.

Illinois: Booth v. Storrs, 75 Ills.,

Indiana: Fishburn v. Jones, 88 In-

Pennsylvania: Lancaster, etc., v. Albright, 21 Penn. St., 228.

A person taking a bond for the future good conduct of an agent already in his employment, must communicate to a surety his knowledge of the past criminal misconduct of such agent in the course of such past employment, in order to make such bond binding.

The mere non-communication of such knowledge, irrespective of motive or design, is a fraud, in law, which will invalidate the obligation: Sooy v. State, 39 N. J. Law, 135; Mayne v. Commercial, etc., 52 Penn. St. R., 843.

The sureties upon the bond of a cashier of a national bank were not liable to the directors of the bank for losses caused by the defalcation of the cashier, where the sureties were misled as to the condition and management of the bank by the publication of reports required by the national currency act, and the bond was entered into subsequent to, and the defalcation occurred before, the publication of the reports: Graves v. Lebanon National Bank, 10 Bush (Ky.), 23, 1 Am. Law Times R., 59.

The general rule that an indorser of a promissory note contracts that the instrument itself and the antecedent signatures are genuine, does not apply where the holder has procured an indorsement upon a forged note with knowledge of the forgery, and upon a representation to the indorser that it was genuine, or where the holder received the note after maturity and without consideration from one wito so procured the indorsement: Turner v. Keller, 66 N. Y., 66. Where a person with knowledge that

he had been induced to sign the promissory note on which suit had been brought as surety, through the agency of the principal maker and payee, by fraudulent representations that would have been for him a valid defence in the suit thereon after the note had matured, with a full knowledge of the facts constituting the fraud but ignorDavies v. London and Provincial Marine Insurance Co. Fry, J.

ant that the fraud was a defence in law. voluntarily requested the payee to extend the time of payment of the note, which was done, and upon that consideration promised to pay; held, he thereby waived his defence to the note: Rindskopf v. Doman, 28 Ohio St. Rep., 516.

See also Reed v. Siderner, 32 Ind.,

A surety on the bond of the cashier of a bank is not discharged by the fact that the cashier had, before the bond was given, committed frauds upon the bank, if such frauds were unknown to the officers of the bank, although they were guilty of gross negligence in not discovering them: Tapley v. Martin, 116 Mass., 275.

See also State v. Atherton, 40 Mo.,

The sureties upon a bond, given by an employee to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming to his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal known to the employer, and a continuance of the employment after such default, in the absence of fraud and dishonesty on the part of the employee. It seems that the rule is otherwise where the default is of a nature indicating want of integrity in the employee, and this is known to the employer: Atlantic, etc., v. Barnes, 64 N. Y., 385; Howe, etc., v. Farrington, 16 Hun, 591.

In an action by the state upon a state treasurer's bond, the obligors can be held responsible for moneys received officially by the treasurer during the period covered by the bond, and applied by him to the satisfaction of defalcations which he had committed before that period, the state having received the moneys without knowledge of the misapplication: Sooy v. State, 41 N. J. Law, 395.

But see State v. Atherton, 40 Mo.,

A composition agreement, signed by the plaintiffs and other creditors of G., contained a condition that it should not be binding unless signed by all the creditors. Composition notes were delivered to the plaintiffs under the agree-

ment, indorsed by the defendant as The agreement was not surety for G. signed by all the creditors, but the fact was not known to the defendant when he indorsed the notes. Held that he could set up, in his defence, the noncompliance with the condition, in a suit brought upon the notes so indorsed by him; Doughty v. Savage, 28 Conn.,

Though the creditor is not responsible for the misrepresentation or noncommunication of circumstances by the debtor, where there is no communication between the creditor and the surety: 17 Alb. Law J., 340; 2 White &

Tudor's Lead. Cas. in Eq., p. 1871.
Canada, Upper: Municipal, etc.,
v. Douglas, 17 Grant's Chy., 462; Peers
v. Oxford, 1d., 472.

English: Owen v. Homan, 8 Macnaghten & Gordon, 378; Small v. Currie, 2 Drewry, 102; Wythes v. Labouchere, 8 De Gex & Jones, 593, and cases cited by Mr. Perkins, Little, Brown & Co.'s ed.

Illinois: Booth v. Storrs, 75 Ills., 438; Roper v. Trustees, etc., 91 Ills.,

518, 9 Cent. L. J., 266. Indiana: Ham v. Greeve, 34 Ind., 19. New Jersey: But see Sooy v. State,

89 N. J. Law, 135, 141.

New York: Western, etc., v. Clinton, 66 N. Y., 326; Wheaton v. Fay, 62 N. Y., 275; Howe, etc., v. Farrington, 16 Hun, 591.

Pennsylvania: Wayne v. Com. National Bank, 52 Penn. St. R., 343.

Tennessee: Trevathan v. Caldwell,

4 Heisk., 535. United States, Supreme Court: Magee v. Manhattan Ins. Co., 92 U. S.

Rep., 93, 45 How Pr., 413.

A few of the states seem to hold the That a surety is not liable contrary. if the creditor knew facts when he accepted the obligation which would have prevented the surety from signing and omitted to disclose them, though not interrogated, and though the creditor had no interview with the surety.

Maine: Franklin Bank v. Cooper,

36 Maine, 180, 39 id., 542.
Ohio: Dinsmore v. Tidball, 34 Ohio

St. R., 411.

Pennsylvania: Where directors of the bank, creditor, took active part in procuring the surety: Lancaster Bank v. Albright, 21 Penn. St. R., 228.

West Virginia: If the concealment

by the creditor was *fraudulent*, otherwise not: Warren v. Branch, 15 W. Va., 22, elaborately considered, and reviewing many cases.

As a rule of law, strict integrity and complete fairness are due from the creditors of a debtor to one who is about to become surety for such debtor; but this rule will not excuse the person about to become surety from reasonable attention to the circumstances under which he is called upon, and reasonable diligence to inform himself as to the prudence of the act he is about to do: Stedman v. Boone. 49 Ind., 469.

do: Stedman v. Boone, 49 Ind., 469.
Fraud must not be induced by the person who complains of it, nor must he suffer himself to become an indolent victim: Stedman v. Boone, 49 Ind., 469.

If a person who is asked to become surety for another is put upon his guard by the circumstances surrounding the party for whom he is asked to become surety, and can ascertain from the person present all the facts necessary to shield himself from fraud, he should make the inquiry: Stedman v. Boone, 49 Ind., 469.

Where a party agrees to become bound for \$1,500 expected to be advanced in cash to the principal for business purposes, and but \$1,000 was actually so advanced, and the chief portion of the residue was adjusted by discharging an old debt to the party making the advance, and no notice of this was given to a surety, he is exempt from liability: McWilliams v. Mason, 6 Duer, 276; Ham v. Greeve, 34 Ind., 19, 17 Alb. L. J., 340; Doughty v. Savage, 28 Conn., 146; Pidcock v. Bishop, 3 B. & C., 605, 10 Eng. C. L. In Mississippi, where a surety agreed

In *Mississippi*, where a surety agreed to become responsible for property bid off at an auction, and the creditor fraudulently included a debt afterwards incurred in another matter, the note was held invalid only for the excess: Clopton v. Elkin, 49 Miss., 95.

In *Illinois* such a note is held void: Davis, etc., v. Buckles, 89 Ills., 237.

Although a surety or guarantor, who agrees to become bound for a certain sum to be loaned in cash to his principal for particular purposes, is relieved from liability if the lender, knowing of such agreement, advances the amount merely by transferring securities for a part and adjusting the residue by dis-

charging an old debt; yet, where the agreement of the lender to make such an advance upon the guaranty is first made, and the guaranty having been afterward obtained, the lender faithfully performs his agreement, the surety or guarantor is not absolved from liability, because the principal debtor induced him to become bound by a concealment or misrepresentation as to the nature of the agreement, unknown to the lender: McWilliams v. Mason, 1 Rob., 576, 2 Abb. Pr., 211, distinguishing S. C., 6 Duer, 276; Coleman v. Bean, 1 Abb. Ct. App. Dec., 394; Davis, etc., v. Buckles, 89 Ills., 237; Von Windisch v. Klaus, 46 Conn., 433; Quin v. Hard, 43 Verm., 875.

See Warren v. Branch, 15 West Virginia, 22.

A creditor is not precluded from recovering against his debtor's surety if he does not know of any confidential relation between the two, and has no reason to believe the debtor was guilty of fraud or improper concealment as against the surety: Lee v. Wisner, 38 Mich., 82.

Where a bond is taken in a legal proceeding, a surety cannot avoid it on the ground that he was induced to sign it by a mistake as to its contents, produced by an incorrect statement of the judge taking it as to its effect—i.e., that it was simply a bond for the appearance of debtor, when in fact it was conditioned that he would apply for an assignment of his property and for a discharge, and prosecute the same until he obtained such discharge: Wheaton v. Fay, 62 N. Y., 275.

B., and the defendant C., by means of a fraudulent conspiracy, procured the removal from office of a former guardian of said B., and the appointment of the defendant C. in his place, for the purpose of getting the possession and control of the money and estate of said B., and spending the same for their joint benefit. The removal of the former guardian having been accomplished, B. and C., concealing their purpose thus to appropriate the money and estate of B., induced the defendants S. and T. to become the sureties of C. upon his bond to the judge of probate as guardian of B. Subsequently B. and C., in pursuance of their original undertaking, obtained possession of the said money and estate of B. and

Ex parte Ibbetson. In re Moore. C.A.

squandered it in criminal and adulterous living. In an action of debt, upon said bond, in which B. was the plain-action: Judge of Probate v. Cook, 57 tiff in interest:

Held, S. and T. could not set up the N. H., 450.

[8 Chancery Division, 492.]

V.C.H., Nov. 5, 1877. C.A., March 20, 27; April 5, 1878.

4921

\*In re CHENNELL.

## Jones v. Chennell.

[1876 C. 400.]

Appeal for Costs—Judicature Act, 1873, ss. 19, 49—Rules of Court, 1875, Order Lv— Further Evidence on Appeal—Order LVIII, r. 5—Investment of Trust Money on Leaseholds—Costs of Suit.

A mortgagee of a share of the proceeds of a real estate devised in trust to sell and to invest the proceeds in government or real securities, commenced an action against the mortgagor and the trustee of the will, alleging that the money had been invested upon improper securities. An order was made directing accounts and inquiries, and reserving further consideration. Shortly afterwards the trustee paid into court the amount of the mortgaged share, and paid to the other beneficiaries their shares. The certificate found these payments, and as to the mode of investment stated simply that the money had been invested on mortgage of leaseholds. On further consideration the plaintiff did not give notice to read the evidence used in chambers. Hall, V.C., declined to hear the evidence taken in chambers, held that on the finding in the certificate the investment was not shown to be improper, and that the action was unnecessary, and made an order giving the trustee his costs, and costs, charges, and expenses out of the fund in court:

Held, by the Court of Appeal,

1. That as the order gave the trustee costs, charges, and expenses, not being 493] \*costs of suit, it was not simply an order as to costs within the discretion of the court, and was subject to appeal:

2. That the case was one where leave to adduce further evidence on the appeal ought to be given, so as to bring before the court full information as to the nature

of the investments:

3. That under a trust to invest in real securities an investment on mortgage of leaseholds is improper, unless the leaseholds are for a long term of years at a pepper-

corn rent without onerous covenants:

4. That the order of the Vice-Chancellor as to costs being made on the ground, which was established, that the fund never had been, nor had been believed by the plaintiff to be, in danger, and that the action was therefore unnecessary and improper, ought not to be interfered with; and that as the other beneficiaries had had no benefit from the action, the costs were properly payable out of the plaintiff's share.

[8 Chancery Division, 519.]

C.A., March 16, 1878.

\*Ex parte Ibbetson. In re Moore. 5191

Reputed Ownership-Order and Disposition-Chose in Action-Policy of Assurance-Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15, subs. 5.

A policy of life assurance is a "thing in action," and is therefore excepted from the operation of the reputed ownership clause, sect. 15, of the Bankruptcy Act, 1869. C.A. Ex parte lbbetson. In re Moore.

1878

This was an appeal from a decision of Mr. Registrar Hazlitt, acting as Chief Judge in Bankruptcy.

On the 20th of August, 1875, an agreement in writing was entered into between Thomas Moore, a trader, and Frederick Ibbetson, by which it was agreed that, in consideration of a sum of £2,819 then owing from Moore to Ibbetson, and to secure which, with interest, a mortgage bearing even date had been executed by Moore, Moore should with all convenient speed pay off a sum of money owing to the London and South Western Bank, and obtain from the bank two policies of assurance for £500 and £200 respectively, then in the hands of the bank, and would forthwith execute to Ibbetson such an assurance of the policies to collaterally secure to him the sum owing to him as aforesaid as he might require. On the 1st of November, 1877, Moore filed a liquidation petition, under which, on the 17th of December, a When the petition was filed the trustee was appointed. £2,819 still remained due to Ibbetson, and the policies were still in the hands of the bank, their debt being still unpaid. No notice of the agreement of the 20th of August, 1875, was given to the bank until the 31st of December, 1877, and no notice of it was given to the insurance company until the 6th of March, 1878. Ibbetson applied to the Court of Bankruptcy for an order declaring that, subject to the amount due to the bank, he was entitled to the policies as against The Registrar refused the application, on the the trustee. ground that the policies were at the commencement of the liquidation in Moore's order and disposition. Ibbetson appealed.

Roxburgh, Q.C., and Oswald, for the appellant: A policy of assurance is clearly a "thing in action," and it is therefore \*expressly excepted from the reputed ownership [520 clause: Rankruptcy Act 1860 a 15 subs 5 (1)

clause: Bankruptcy Act, 1869, s. 15, subs. 5 (1). [They were stopped by the court.]

De Gex, Q.C., and G. Cary, for the trustee: It has never yet been decided that a policy of assurance is a thing in action. In Ex parte Union Bank of Manchester ('), the Chief Judge decided that shares in a joint stock company are not "things in action" within sect. 15, sub-sect. 5.

[JESSEL, M.R.: I can conceive that some shares might be

choses in action, while others might not be.]

At any rate, that decision justifies the trustee in the course

<sup>(1)</sup> Sect. 15, sub-sect. 5, provides that "things in action, other than debts due to him" (the bankrupt) "in the course of his trade or business, shall not be deemed

goods or chattels within the meaning of this clause."

<sup>(2)</sup> Law Rep., 12 Eq., 854.

Elias v. Griffith.

C.A.

which he has taken. Moreover, the trustee has the better title, because he gave notice to the insurance company before the appellant did.

[JESSEL, M.R.: Has an assignee in bankruptcy ever been allowed to get rid of a valid mortgage by giving notice to the

trustee or debtor first?

By the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 3, the priority of assignments of policies is regulated by the date of notice to the company. The appellant ought to have been more prompt in asserting his claim.

[JAMES, L.J.: He could do nothing till the bank were paid off, and, moreover, you represent the liquidating

debtor.1

JESSEL, M.R.: The simple question which we have to decide is whether a second mortgagee of a policy of life assurance has lost his right by reason of sect. 15 of the Bankruptcy Act. In my opinion it is clear beyond all argument that a policy of assurance is a "thing in action," and is therefore within the exception contained in sub-sect. 5. The appellant ought to have succeeded before the Registrar, and he 521] must succeed now. The Registrar's order will \*be discharged, with costs in both courts, and there must be a declaration that the appellant is entitled to the policies, subject to the rights of the bank.

JAMES and BRAMWELL, L.JJ., concurred.

Solicitor for appellant: N. Jourdain.

Solicitors for trustee: G. Mayor Cooke & Dames.

### [8 Chancery Division, 521.]

V.C.H., May 7, 8, 9, 10, 12, 14; June 19, 1877. C.A., April 2, 8, 9; May 4, 1878.

ELIAS V. GRIFFITH.

[1878 E. 42.]

Wasto—Lessee—Mine—State Quarry opened by the Lessor—Acquiescence—Intermediate
Assignee of Term.

To enable a termor to work mines it must be shown that the reversioner had commenced the working of the mines with a view to making a profit; and there is no

difference in this respect between a mine and a quarry.

In 1802 the owner of land demised it to a mortgagee for 500 years at a peppercorn rent. In 1811 the mortgagor granted a lease for twenty-one years to a third party of the mines and quarries under the land. Before that date a slate quarry had been opened and worked by the mortgagor on the property; and after that date, but at what time was uncertain, a second quarry was opened and was worked till the commencement of the suit. In 1820 the mortgagee foreclosed the equity of redemption in the term of 500 years, and took possession of the property. In 1873 the plaintiff, the reversioner on the term of 500 years, filed a bill to restrain the termor from working the slate quarries during the term, and for an account of profits:

C A

Elias v. Griffith.

Held, by Hall, V.C., and by the Court of Appeal, that if the quarries had been opened by the termor without the authority of the reversioner, the plaintiff would have been entitled to the relief prayed, notwithstanding the lapse of time:

But held, by the Court of Appeal (reversing the decision of the Vice-Chancellor),

But held, by the Court of Appeal (reversing the decision of the Vice-Chancellor), that the result of the evidence was that both the quarries had been opened by the authority of the reversioner, and that the termor was, therefore, entitled to continue

to work them for the remainder of the term.

An intermediate assignee of the term, who had not worked the quarries himself, but had received royalties under sub-leases granted before he came into possession, and had parted with his interest before the commencement of the suit, was held, not to be liable to account either for the profits made, or for the royalties paid to him during his possession of the term.

THE bill in this suit was filed by Owen E. W. Elias and others against W. M. Griffith and the Snowdon Slate Quarries Company, \*to restrain the defendants from work- [522 ing certain slate quarries on a farm called Ffriddison or Ffriddisa, in the parish of Beddgelert in North Wales. The facts were as follows:

By an indenture dated the 13th of January, 1802, Robert Bulkely Owen, who was seised in fee simple of the farm in question, demised the same to Morris Griffith, his executors, administrators, and assigns, for a term of 500 years at a peppercorn rent, by way of mortgage for securing the repayment of £400 and interest. No power was given by the deed to commit waste, or to open or work mines or quarries in the premises demised.

By an another indenture, dated the 26th of September, 1810, the mortgager charged the mortgaged premises with

the payment of a further sum of £600.

In the year 1816 Griffith brought a suit to foreclose the equity of redemption, and obtained a decree to that effect, which was made absolute in August, 1820. Pending the foreclosure suit, he obtained possession of the premises by an action of ejectment. Morris Griffith died in 1835, having by his will devised the Ffriddison farm to his wife and David Griffith as joint tenants. Mrs. Griffith having survived David Griffith, devised the property to her son John Griffith, who died in 1866, having by his will devised the property to his son, the defendant, William Morris Griffith.

There were two slate quarries on the farm, called in the argument the Upper and Lower Quarries. It was satisfactorily proved that the mortgagor before the date of the mortgage dug and sold slate from the lower quarry; that he granted a lease of it in 1808; and also that in September, 1811, a lease for twenty-one years was granted by the mortgagor of the mines and slate under the whole property; but there was a conflict of evidence at what time the upper quarry was first opened. The effect of the evidence is stated

in the judgments of the Vice-Chancellor and the Court of

Appeal.

John Griffith granted certain take-notes and leases for working the slate quarries on the farm; and on the defendant W. M. Griffith coming into possession of the farm certain of the quarrying leases had become vested in the defendants, the Snowdon Slate Quarries Company, for the 523] terms granted by such leases. The \*defendant W. M. Griffith never himself worked the quarries, but had received in respect of rent or royalties reserved by such leases. sums amounting to about £20.

By an indenture dated the 30th of April, 1873, the defendant W. M. Griffith, in consideration of £5,000, conveyed all his interest in the farm to the defendants the Snowdon Slate Quarries Company, their successors and assigns.

The plaintiffs were the owners of the reversion of the farm and quarries on the determination of the term of 500 years, and by their bill they prayed for an injunction restraining the defendants from taking slates or other minerals from the premises, and for an account of profits made by the company, and of royalties received by Griffith. It appeared that they did not become acquainted with their title to the reversion till December, 1872, when Griffith applied to them

to release their right to him.

The Snowdon Slate Quarries Company was soon afterwards wound up, and the farm and quarries were sold by the liquidator on the 20th of May, 1875, after the filing of the original bill in the suit, and were bought by the West Snowdon Slate Company, notwithstanding the protest of the plaintiffs' solicitor, who attended the sale and furnished the auctioneer with a copy of the bill. The West Snowdon

Slate Company were then added as defendants.

The defendant Griffith by his answer disclaimed all interest in the property. He denied that he had himself cut any of the slate, and stated that the money which he had received from the royalties did not exceed £20, and that was received more than six years before the bill was filed.

The cause came on for hearing before Vice-Chancellor

Hall on the 7th of May, 1877.

Numerous witnesses were examined in court before the

Vice-Chancellor.

Morgan, Q.C., North, Q.C., and Rolland, for the plain-They cited Bishop of London v. Web ('); Attorney-General v. Eastlake (\*); Lord Courtown v. Ward (\*); Ba-

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con's Arb. ('); Gayford \*v. Moffatt ('); Adair v. [524 Shaftoe (\*); Purcell v. Nash (\*); Thorneycroft v. Crockett(\*); Hughes v. Williams(\*); Rochdale Canal Company v. King ('); Goodson v. Richardson (\*),

Dickinson, Q.C., McIntyre, Q.C., and Bradford, for the Snowdon Slate Quarries Company, contended that the evidence showed that the upper quarry, as well as the lower, was opened by or with the authority of the mortgagor; that the same rule applied to a slate quarry as to a mine, and that a lessee was entitled to continue to work an open quarry; that the plaintiffs had acquiesced in the working of the quarries by the mortgagees and those who claimed under them, and had allowed them to spend large sums of money in working them; and that they had been guilty of laches in not asserting their rights sooner. They cited Viner v. Vaughan (\*); Mansfield v. Crawford (\*\*).

Eddis, Q.C., and Solomon, for the West Snowdon Slate Company, supported the same arguments. They referred to Spencer v. Scurr ("); Bagot v. Bagot ("); Anderson v. Pignet (").

W. Pearson, Q.C., and Freeling, for the defendant Griffith, cited Powell v. Aiken ("); Hood v. Easton ("); Jegon v. Vivian (''); Knight v. Mosely (''); Huntley v. Russell (''); Earl Cowley v. Wellesley (").

Morgan in reply.

1877. June 19. Hall, V.C., after shortly stating the title

of the plaintiffs and the defendants, continued:

Several defences have been raised to the plaintiffs' suit. It has been contended that laches and acquiescence are a To this it is answered, as I think correctly, bar to the suit. that because trespasses \*have been committed by a [525]termor by the abstraction of minerals from the demised property, such trespasses do not create a right to commit further trespasses of the same character. As to this I refer to the cases of the Attorney-General v. Eastlake (") and

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(¹) Waste, C. 3.
                                                           (11) 31 Beav., 384.
 (*) Law Rep., 4 Ch., 138.
(*) Cited 19 Ves., 156.
                                                           (19) 82 Beav., 509.
                                                           (18) Law Rep., 8 Ch., 180.
(14) 4 K. & J., 848.
 (4) 1 Jones, Ir. Ex., 625.
(5) 16 Sim., 445.
(6) 12 Ves., 493.
(7) 2 Sim. (N.S.), 78, 86.
                                                           (15) 2 Jur. (N.S.), 729.
                                                           (16) Law Rep., 6 Ch., 742.
                                                           (<sup>17</sup>) Amb., 176.
                                                           (<sup>18</sup>) 13 Q. B., 572.
(8) Law R., 9 Ch., 221; 8 Eng. R., 835.
                                                           (19) Law Rep., 1 Eq., 656,
 (*) 2 Beav., 466.
                                                           (20) 11 Hare, 205.
(16) 9 Ir. Eq., 271.
     25 Eng. Rep.
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Lord Courtown v. Ward ('). No case has been made out entitling the defendants to require the court to refuse relief on the ground of the reversioner having so encouraged the acts of the lessees as by reason thereof to entitle the defendants to ask the court to refuse the plaintiffs relief. counsel for the defendant Griffith contended that the court would refuse to assist the plaintiffs because, as he said, it would be against public policy to prevent the working of the slate for a term of 400 years and upwards, the remainder of the 500 years term, which would be the effect of an in-There is no authority for such a contention, or iunction. principle upon which it can be sustained. Such contention involves this anomaly, that all demises for terms exceeding some period to be laid down by the court in each case, or for all cases, are to be deemed demises without impeachment of waste. A termor and reversioner can at any time concur in an arrangement for working the slate. It was said that the plaintiffs' estate being to fall into possession after so long a time, was not worthy of regard by the court, but its being a valuable interest is plain when it is considered that it enables the plaintiffs, if they are in other respects right, to prevent the defendants getting the slate; such a power is valuable as necessitating the purchase of the right of prohi-Such an interest has been frequently recognized. I need only refer to the observations of Lord Cranworth in the Rochdale Canal Company v. King (\*) and of Lord Selborne in Goodson v. Richardson (1).

[His Lordship then referred to an objection to the plaintiffs' title arising out of the deed of 1817, and continued:

For the defendant Griffith and the Snowdon Slate Quarries Company it is contended that inasmuch as they have parted with all their interest in the property, an injunction against them cannot be granted, the rule of the court being said to be, No account, no injunction. But that rule has been 526] held to be inapplicable to \*the case of a mine: Parrott v. Palmer ('); and the case there cited. And as regards the Snowdon Slate Quarries Company, their alienation has been pendente lite.

The plaintiffs have endeavored to show that the case of slate is different from the case of coal and other minerals, and that a termor of property containing slate cannot get such slate without committing waste, although there was an open quarry when the term was created. If this be the law it would render it unnecessary for me to determine whether

<sup>(1) 1</sup> Sch. & Lef., 8.

<sup>(8)</sup> Law Rep., 9 Ch., 221; 8 Eng. R., 845. (4) 3 My. & K., 632.

<sup>(9) 2</sup> Sim. (N.S.), 78.

the defendants' contention as to there being open quarries is or is not well founded. But I am of opinion that such is In Bacon's Abridgment (') the law is stated to not the law. be otherwise, and to the same effect are the Year Book (1), Rolle's Abridgment (\*), Moyle v. Mayle (\*), Coke upon Little-

ton (\*), and White v. Walsh (\*).

The Master of the Rolls in Ireland, in Mansfield v. Crawford ('), referred to the judgment of Chief Baron Joy in Purcell v. Nash (1), as stating that mines and quarries were not analogous as regards waste, but it appears to me that the Master of the Rolls misunderstood the observations of Chief Baron Joy which had, I consider, reference to there being in the case before him a reservation of royalties, which he considered included the quarry, and that this is so, appears to me to be confirmed by what was said by Lord St. Leonards in Coppinger v. Gubbins (\*). Rightly understood, the judgment of Chief Baron Joy is, I think, an authority that a limestone quarry, which cannot, I think, be distinguished from a slate quarry, is subject to the same law as regards waste as a mine, that is to say, that it can be worked by a lessee if open when the lease is granted.

This brings me to the consideration of the questions: first, Whether the quarries in respect of which the plaintiffs seek relief were or were not open when the deed of 1802 was executed; secondly, If not, whether they were open when the mortgagee entered into possession, that is, whether they were opened by the mortgagor or his lessees whilst he remained mortgagor in possession; \*thirdly, If the first of [527] these questions be answered in the negative, and the second in the affirmative, whether such opening would entitle the

termor to get the slate.

The first and second questions are questions of fact, and I answer the first in the negative. The second I answer by finding that the mortgagor or his lessees did, while he remained mortgagor in possession, open a quarry on that part of the mortgaged property which is to the west of the narrow strip marked No. 9 on the plan of the Ffriddissa estate, and which quarry was called in the argument the lower quarry, and that neither the mortgagor nor his lessees, while he remained in possession, opened a quarry elsewhere on the mortgaged property.

<sup>(</sup>¹) Waste, C. 8. (²) 9 H. 6, 66 B. (³) Vol. ii, p. 816.

Owen, 66.

<sup>(</sup>³) 58 b.

<sup>(&</sup>lt;sup>6</sup>) l Jones, Ir. Ex., 626 n.

<sup>(\*) 9</sup> Ir. Eq., 271. (\*) 2 Jones, Ir. Eq., 116,

<sup>(9) 3</sup> J. & Lat., 397,

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[His Lordship then referred to the evidence on which he based his conclusion as to the first and second questions, and continued:] As to the third question, which is one of law, I am of opinion that the termor became dispunishable for waste as to the lower quarry, by reason of the mortgagor or his lessees having opened that quarry. I consider that the mortgagor using the property, by opening a quarry, must be taken to have done so as well with reference to the future enjoyment of it by his mortgagee as by himself.

Having found as above upon the questions of fact, and determined the questions of law, how does the case stand? As to the defendant Griffith, it has been contended that he is not liable to account. It appears that his predecessor in title, that is, the prior owner of the 500 years term, granted to certain persons licenses to get slate, such licenses being for terms of years, which became vested in the defendants, the Snowdon Slate Quarries Company, Limited, that his title to the term began on his father's death, on the 21st of December, 1866, that he has received some sum for royalties, payable under the licenses so granted, and that he conveyed the property to the Snowdon Slate Quarries Company, Limited, by a conveyance dated the 30th of April, 1873. By this conveyance Griffith was unable to convey in fee. Its operation was to convey the residue of the 500 years term. It was contended that the licenses, though having regard to my findings valid as to part only of the property, were binding upon Griffith, and therefore that he is not liable to account. But it appears to me that \*the receipt by Griffith of royalties for slate improperly gotten—and it has not been contended that his receipts were in respect only of royalties for slate gotten from the lower quarry—makes him accountable for the profits equally with the Snowdon Slate Quarries Company, Limited. As to this I refer to what was said by Vice-Chancellor Wood in Powell v. Aiken (1). In that case it was sought to charge mortgagees with moneys received by their mortgagors, and paid over by them to the mortgagees, such moneys being proceeds of coal improperly gotten by the mortgagors from an adjoining colliery. The Vice-Chancellor held that the mortgagees could not be charged, they not having known that the moneys had so arisen, but he said had they known it they would have been accountable, as they would have been parties to the abstraction. In that case reference was made to the case of Doe v. Harlow (\*), in which it was laid down that a party receiving rent from a wrong-

(1) 4 K. & J., 349.

(\*) 12 A. & E. 40.

doer was accountable for rents and profits to the rightful In Doe v. Harlow the party in possession had been let into possession by the party held liable. Griffith's predecessor in title granted the licenses, but this appears to me unimportant. Griffith adopted the transaction by receipt of the royalties, and thus, as Vice-Chancellor Wood said, became an actor in the wrongful abstraction. On this point I may also refer to the judgment of the Vice-Chancellor Stuart in Hood v. Easton ( There was an appeal from the decision in that case (1), and there was a compromise, but apparently the ground of compromise had reference to a matter independent of the Vice-Chancellor's views of the case in reference to the purpose for which I have referred to it. Griffith's accounting must be limited to the time when he conveyed to the Snowdon Slate Quarries Company, Limited, and to six years from the

filing of the original bill.

As to the Snowdon Slate Quarries Company, Limited, they in the year 1875 conveyed the property to the West Snowdon Slate Company, Limited. The accounting of the Snowdon Slate Quarries Company, Limited, must be limited to the time preceding the date of the conveyance to the West Snowdon Slate Company, and must be limited, as I have mentioned, to the six years before the date of the filing As to the West Snowdon Slate \*Com- [529] of the bill. pany, their accounting must date only from the time of the conveyance to them. As regards Griffith, he being accountable as above mentioned, he ought not to be charged with the royalties he received. The plaintiff's claim of royalties in his statement of claim should not, I think, be treated as an adoption of the licenses to work. The account will of course be confined to the working in the upper quarry, and must be taken in the milder mode of accounting in respect of mineral abstracted, as in Jegon v. Vivian (\*); that is, the accounting party will be allowed the cost of hewing. I think this proper, because as regards the Snowdon Slate Quarries Company, they, at all events until they became aware that their lessor was only a termor, worked under a bona fide belief that they were entitled to do so. regards all the parties, there has been a substantial controversy as to there having been a quarry opened on each of the two portions at times entitling the termor and those claiming under him to get slate in each of such portions. The plaintiffs having only succeeded as to one portion of

<sup>(9) 2</sup> Jur. (N.S.), 917. (1) 2 Jur. (N.S.), 729, (\*) Law Rep., 6 Ch., 742,

the estate, there will not be any costs up to and including the present time. The injunction must be framed in accordance with what I have stated as to the working.

From this judgment the defendants appealed. The appeal

came on to be heard on the 2d of April, 1878.

Dickinson, Q.C., and Bradford, for the Snowdon Slate Quarries Company: The evidence is conclusive that the lower quarry was opened by the mortgagor, and consequently the mortgagee and those claiming under him had a right to continue working it. There is no difference in this respect between a quarry and a mine of coals or other min-The only real question is about the upper quarry. If the evidence is doubtful at what exact time it was opened, it has been at all events worked for a long series of years by persons lawfully in possession of the surface, and the court will presume that the origin of the enjoyment was lawful: Leconfield v. Lonsdale ('); Seaman v. Vawdrey ('). We have been in undisturbed \*enjoyment of the property under a title derived through three wills and a deed of purchase, and the court will not now disturb our possession. The plaintiffs had as good opportunities of knowing the facts as we had, and have been guilty of laches in not sooner asserting their rights, if they have any: Bulley v. Bulley (\*); Parrott v. Palmer (\*). Through their acquiescence we have incurred great expense in working the quarries.

Horne Payne, and Turner, for the West Snowdon Slate

Company.

W. Pearson, Q.C., and Freeling, for the defendant Griffith: Whatever relief the plaintiffs may be entitled to against the other defendants, they have none against Griffith. He never worked the quarries or granted any leases for working them. He only received the royalties under leases granted by his predecessors, amounting altogether to about £20. Moreover, in 1873 he parted with all his interest, and on the original bill being filed he at once disclaimed all interest.

Osborne Morgan, Q.C., and North, Q.C. (Rolland with them), for the plaintiffs: The defence of laches and acquiescence is not applicable as between lessor and lessee, even where the lessee has had no notice and has been at great expense. No length of time can convert waste into a lawful

<sup>(1)</sup> Law Rep., 5 C. P., 657.
(2) Law Rep., 9 Ch., 739; 10 Eng.
(3) Law Rep., 9 Ch., 739; 10 Eng.
(4) 3 My. & K., 632.

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act: Lord Courtown v. Ward ('); Attorney-General v. East-lake ('); Adair v. Shaftoe ('); Gayford v. Moffatt ('); Rob-son v. Flight ('); Clements v. Welles ('); Finch v. Shaw ('); Phillips v. Phillips (\*); Pickett v. Packham (\*). Admitting that a lessee is entitled to work a mine which the lessor has opened, it does not follow that he is entitled in like manner to work out of a quarry. In the latter case the surface is taken away: \*Purcell v. Nash("); Mansfield v. [53] Crawford ("); Coppinger v. Gubbins (").

With respect to Griffith, when the original bill was filed we knew of no one else who was interested in the term. do not ask to follow the royalties into his pocket, but we say that he has made himself a party to the trespass, and is liable to the consequences. If he did not grant any of the leases to those who worked the quarries, he confirmed them by receiving rent under them: Doe v. Harlow (1); Powell v.

Aiken (14).

Dickinson, in reply.

May 4. Cotton, L.J., read the judgment of the Court

(James, Cotton, and Thesiger, L.JJ.), as follows:

In this case the plaintiffs filed their bill as owners subject to a mortgage term of 500 years of certain mountain land in Wales, to restrain the working of the slate on that property by the defendants, and for an account. There are two quarries on the property, one called the lower quarry, the other, which is said to be at a distance of two miles from the lower, and much higher up the slopes of Snowdon, called the upper quarry. The Vice-Chancellor found, as a fact, that the lower quarry was worked by the owner of the equity of redemption, or by his lessees, before the mortgagee took possession, and granted neither injunction nor account in respect of this quarry, and from this the plaintiffs have not appealed. But he found, as a fact, that neither the mortgagor nor his lessees while he remained in possession opened the upper quarry, and in respect of this quarry he granted an injunction and account. Against this judgment all the defendants have appealed. The case of the two companies in the view which we take is substantially

<sup>(1) 1</sup> Sch. & Lef., 8. (2) 11 Hare, 205. (3) Cited 19 Ves., 156. (4) Law Rep., 4 Ch., 133. (5) 34 Beav., 110; 4 D. J. & S., 608.

<sup>(6)</sup> Law Rep., 1 Eq., 200.

<sup>(1) 19</sup> Beav., 500. (8) 4 D. F. & J., 208.

<sup>&</sup>lt;sup>9</sup>) Law Rep., 4 Ch., 190. (10) 1 Jones, Ir. Ex., 625; 2 Jones, Ir. Ex., 116.

<sup>(11) 9</sup> Ir. Eq., 271. (15) 3 J. & Lat., 897.

<sup>(18) 12</sup> A. & E., 40.

<sup>(14) 4</sup> K. & J., 848.

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the same. The defendant Griffith stands in a different

position.

We will deal first with the question of law raised by the plaintiffs, namely, that although a termor may lawfully work during his term mines which have been opened by the freeholder before the \*commencement of the tenant's interest, there is such a difference between an open mine and an open quarry that although a termor may lawfully work a mine opened by the freeholder before he acquires possession he cannot work a quarry so opened. In our opinion there is no such distinction. To enable a termor or tenant for life punishable for waste to work mines, it must be shown that the owner of the inheritance, or those acting by his authority, have commenced the working of the mines with a view to making a profit from the working and sale of what is part of the inheritance. When this is established, though no profit has in fact been made, the mine is open in such a sense as to justify the continuance of the working by a termor. When it is established that a quarry has been worked by, or by the authority of, the owners of the inheritance, for the purpose of making a profit by digging, or otherwise raising and selling part of the inheritance, the same principle applies. There is however this difference between a mine and a quarry, namely, that stone or slate is frequently dug for the purpose of building or repairing houses on the property and not for the purpose of profit, and although this is in one sense an opening of a quarry, it is not so in the sense necessary to enable a termor to continue the working. It is not an opening for the purpose of profit. It is not a devotion of the land to the purpose of making profit by the raising and sale of a portion of the inheritance. The case of Purcell v. Nash ('), a decision of the Court of Exchequer in Ireland, was referred to by Mr. Morgan in support of the proposition above referred to. But in Coppinger v. Gubbins (\*) Lord St. Leonards treated that case as depending on the reservation of royalties contained in the lease. We cannot treat that case as an authority for the proposition of law for which the plaintiffs contend.

Ought we to hold that the upper quarry was so opened as to entitle the termor to work it? The term was created in the year 1802, and the termor foreclosed the equity of redemption in 1820, and entered into possession in or shortly before that year. In the year 1808 a lease had been granted of one quarry, in the lease stated to be then open, and which,

<sup>(1) 1</sup> Jones, Ir. Ex., 625; 2 Jones, Ir. Ex., 116.

<sup>(9) 3</sup> J. & Lat., 897, 411.

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we think, must be presumed to have been the lower quarry; and in September, 1811, a lease for \*twenty-one years was granted of the mines and slate rock in the entire property. This appears from an abstract made in the year 1815 by the solicitor of the then owner of the reversion, who was then trying to sell. There is evidence that this lease was considered but of little value, but there is no evidence that it was ever surrendered or forfeited. At some period between the years 1830 and 1832 a take-note of the slates under the whole estate was granted. It was urged, on the part of the plaintiffs, that this take note was evidence that at its date no quarry was open in the upper part of the property. in our opinion, there is no ground for this contention. take-note is a license to explore and work for a limited time. with an option during that time to take a lease. It shows that the licensees were not in their then knowledge of the property willing to bind themselves by a lease, but nothing more. In the year 1847 a lease was granted of the upper quarry, and it is conceded that from shortly after the date of this lease the upper quarry had been constantly worked. [His Lordship then referred shortly to the evidence as to the working of the upper quarry, and continued:

Under these circumstances, we are of opinion that the original working at the site of the upper quarry ought to be presumed, under the authority of the lease of 1811, to have been lawful instead of unlawful, and that consequently as the lease was clearly granted for the purpose of enabling the slate to be raised and sold for the purpose of profit, the upper quarry must be considered as one opened by the authority of the owner of the inheritance, so as to enable the termor to work it. The now undisputed fact that the lower quarry was so opened renders the presumption to the same effect as regards the upper quarry derived from the evidence to which we have referred, stronger than if the estate had been, but for the upper quarry, ad-

mittedly unopened.

In arriving at this conclusion we differ from the Vice-Chancellor who, as was very properly urged upon us, heard and saw the witnesses. If the question from our point of view had been one depending mainly, or to any considerable extent, upon the credibility of the witnesses, we should not have felt justified in reversing the finding of the Vice-Chancellor, but this is not the case. The difference between the court and the Vice-Chancellor \*is as to the effect [534 which, having regard to the existence of the lease of 1811, ought to be given to the facts proved.

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This disposes of the case against all the defendants. although it is not necessary for the decision of the case, we think it right not to pass in silence the decree which has been made against the defendant Griffith. He succeeded to the property after the grant of the lease under which the Snowdon Slate Quarries Company, previously to the filing of the bill, worked the slate, and though he received the rent payable by them he never himself worked any slate, or directed the working thereof. Moreover, before the filing of the bill he parted with all his interest in the property to the defendants, the Snowdon Slate Quarries Company, and immediately after the bill was filed his solicitor so informed the solicitor of the plaintiffs. Under these circumstances we think that even if the plaintiffs had been entitled to a judgment against the defendants, the two companies, they were not entitled to either injunction or account against the defendant Griffith.

The judgment of the Vice-Chancellor must be reversed. and the bill dismissed against all the defendants with costs.

Solicitor for plaintiffs: J. H. Lydall, agent for T. & T. Martin, Liverpool.

Solicitors for defendants: W. Webb; W. A. Crump.

See 22 Eng. Rep., 318-323 note.

One tenant in common is liable to account to his co-tenant for his share of rents received: Wright v. Wright, 59 How. Pr., 176; Waters v. Waters, 48 Iowa, 555.

One co-tenant in common has a lien upon his co-tenant's share for his pro-

portion of such rents: Wright v. Wright, 59 How. Pr., 176.
In a suit on a bond against the heirat-law, who has aliened the descended lands before suit brought, the recovery will be only for the value of the lands in the condition in which they were at the time the descent cast.

In such a suit, the improvements put on the land by the heir will not enter into the valuation of such land, nor will the heir be called on for the rents and profits, nor, on his side, can he claim for repairs: Fredericks v. Isenman, 41 N. J. Law, 212.

In Michigan, by statute, in certain cases, one tenant in common is entitled to the benefit of improvements he puts upon the common property: Sands v. Davis, 40 Mich., 14.

So in Louisiana: Jackson v. Ladel-

ing, 99 U. S. R., 513.

If taxes be assessed upon lands held in common, and there is a treasurer's sale thereof, one tenant cannot pur-chase the entire property at such sale so as to acquire such adverse title as will deprive his co-tenant of his interest therein: Davis v. King, 87 Penn. St. R., 261; Harrison v. Harrison, 56 Miss., 174; Russell v. Peyton, 4 Bradwell (Ills.), 473.

Though the co-tenant so paying has a lien upon his co-tenant's share therefor: Harrison v. Harrison, 56 Miss., 174.

Tenants in common sustain to each other a relation of trust because of their common interest, and while one cannot act for his individual interest, in hostility to the common interest, yet, if he does what is necessary to the protection of the common interest, he is entitled to charge the common property with the costs of the benefit; but one of the tenants in common of an estate in expectancy is not permitted, by this principle, to discharge a burden on the In re Hutchinson and Tenant.

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common property in the possession of the tenant of the particular estate, ex-cept where it is necessary to prevent the destruction of the expectancy: Harrison v. Harrison, 56 Miss., 174.

One of two or more joint owners, or owners in common, of property may insure his interest separately against loss by fire, and in case of loss is entitled to recover and retain the insurance.

The rule prohibiting one having the same relation with others to property, or standing in a fiduciary relation with others, from taking a title or advantage to their prejudice has no application to such case: Harvy v. Cherry, 76 N. Y.,

[8 Chancery Division, 535.]

M.R., March 28, 1878.

## \*In re Printing and Numerical Registering COMPANY.

Company—Winding-up—Execution Creditor—Priority—Applying Rule in Bank-ruptcy—"Secured Creditor"—Judicature Act, 1875, s. 10—Bankruptcy Act, 1869,

The rule in bankruptcy by which (Bankruptcy Act, 1869, s. 87) an execution creditor for more than £50 loses the benefit of his execution if the sheriff, within fourteen days after a sale, has notice of bankruptcy, applies, under sect. 10 of the Judicature Act, 1875, to a company in liquidation.

In re Albion Steel and Wire Company (1) explained.

The solicitors of a company, being its creditors for more than £50, issued a writ of execution against the company, and on the 20th of December, 1875, lodged it with the sheriff, who thereupon took possession. On the 28d of December a winding-up petition was presented, the company's solicitors being solicitors to the petitioner, and on the 15th of January, 1876, a winding-up order was made, under which the sheriff withdrew, and the company's property was ordered to be sold by the liquidator, but it was declared that the execution creditors should have the same priority against the proceeds of the property as they would have had if it had been sold by the sheriff.

The property having been sold by the liquidator, but the proceeds being insufficient for payment of the company's debts, the execution creditors applied by summons to have their debt paid in priority to the other creditors.

Summons dismissed with costs.

(1) 7 Ch. D., 547.

[8 Chancery Division, 540.] M.R., May 11, 1878.

\*In re Hutchinson and Tenant.

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Will-Gift to Wife absolutely, with Power of Disposition for Benefit of Family-Precatory Trust—"Full Confidence"—"Family,"

A testator gave all his property to his wife "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so"

Held, that the wife took absolutely.

Lambe v. Eames (1) followed.

A testamentary gift by a married man to his "family" should be read as a gift to his "children" to the exclusion of his wife.

(1) Law Rep., 6 Ch., 597.

Francis Roe made his will, dated the 6th of September, 1855, in the following terms. After directing his debts to be paid by his executrix thereinafter named, the testator proceeded: "As to, for, and concerning all my real and personal estates, of whatever nature, kind, or quality, and wheresoever the same may be situate, I give, devise, and bequeath the same to my dear wife, Hannah Roe, absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so." And the testator appointed his wife his executrix.

The testator died in 1864. His widow, Hannah Roe, by her will, dated the 28th of March, 1877, devised and bequeathed all her real and personal estate to her executors and trustees in trust for sale, and shortly afterwards died.

Francis Roe had nine children, eight of whom were now

living.

Hannah Roe's trustees having contracted to sell a public house called the King's Arms at Bakewell, originally forming part of the real estate comprised in Francis Roe's will, the purchaser raised the objection that Hannah Roe did not take an absolute interest under the latter will, but that the will created an ultimate trust in favor of the testator's children, his widow taking only a life estate, and consequently that the concurrence of the children was necessary.

The point was submitted for the opinion of the court upon a summons taken out by the vendors, under the Ven-541] dor and Purchaser \*Act, 1874, to obtain a declaration that they could make a good title under the wills.

B. B. Rogers, for the vendors: I submit that there is no trust for the testator's children, but that his widow took absolutely, Lambe v. Eames ('); Stead v. Mellor ('), where your Lordship distinguished Briggs v. Penny ('). This is in terms an absolute gift, with a superadded power of disposition, which is however nugatory, and does not detract from the prior absolute gift: Southouse v. Bate ('); Weale v. Ollive (').

Dunning, for the purchaser: This is in effect a gift to the widow for life, with a precatory trust in remainder in favor of the testator's children: Shovelton v. Shovelton (\*); Curnick v. Tucker('); Le Marchant v. Le Marchant('); taking "family" to mean "children": Pigg v. Clarke(').

- (1) Law Rep., 6 Ch., 597.
- (\*) 5 Ch. D., 225; 22 Eng. Rep., 51. (\*) 8 Mac. & G., 546.
- (4) 16 Beav., 132.
- (b) 32 Beav., 421.

- (6) 82 Beav., 148.
- (1) Law Rep., 17 Eq., 820; 7 Eng. Rep.,
- 845.
  - (8) Ibid, 18 Eq., 414; 10 Eng. R., 736.
  - (\*) 3 Ch. D., 672; 18 Eng. Rep., 754.

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[JESSEL, M.R.: A testamentary gift by a married man to his "family" should be read as a gift to his "children."]

By adopting the vendors' contention you would entirely cut out the clause after the word "absolutely"—a clause which is significant, and to which effect can and should be given.

In Lambe v. Eames the words were different, and I ask your Lordship to follow the more recent decisions in Cur-

nick v. Tucker and Le Marchant v. Le Marchant.

[Jessel, M.R., mentioned Mackett v. Mackett (1).] JESSEL, M.R.: I have to consider a very short will, and to give my opinion upon it. Now, if it had not been for authority, looking at the will, I should have felt no doubt or hesitation in saying what its meaning was. [His Lordship then read the will as above stated, and continued: It is alleged on one side and denied on the \*other, that [542] these words, "with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," constitute a trust. In my opinion these words, standing by themselves, independently of authority, are not intended to impose any obligation on the widow. They are merely an expression of the testator's wishes and belief, as distinguished from a direction amounting to an obligation. His widow is to have power to give the property to any one she may think fit: she is to be complete owner of the property, but he expects her to dispose of it among his family, that is, his children. There is no occasion to tell her that she is to provide for herself, there being already a prior absolute gift to her. If you make the power override the absolute gift, the wife gets nothing, for you could then only give her an interest by inserting in the power something which is not there, namely, the word "wife." If you do not put in that word, you make her a trustee for the testator's family, that is, his children only; for there is no reported case in which the word "family, when used by a married man, has been held to include his wife as well as his children.

Now that being the position of matters, the question I have really to consider is whether, having come to that conclusion as to the meaning of the instrument, I am compelled by decisions of other judges to arrive at the opposite conclusion. It appears to me that all the cases are distinguishable. Here is a gift by a testator to his wife absolutely, with something which looks like a superadded power, and there are some authorities in which it has been held that under

<sup>(1)</sup> Law Rep., 14 Eq., 49; 2 Eng. Rep., 412.

such a gift the wife takes a life interest only. There is. however, an authority of the Court of Appeal of a strong character against that view. In Lambe v. Eames (1) the testator gave his estate to his widow, "to be at her disposal in any way she may think best for the benefit of herself and family;" and the Court of Appeal held, affirming the decision of Vice-Chancellor Malins, that the widow took absolutely. I observe that the Vice-Chancellor seems to have laid some stress on the words "for the benefit of herself and family" as showing the intention to give the widow an absolute interest. But I do not think it was necessary to do that. 543] If you struck out the word "herself," it \*would still be clear that the widow was to have some benefit. the testator says "for the benefit of herself and family," he merely expresses that which would have been implied, though not expressed, because he has already given a benefit to his widow.

I am, therefore, of opinion that the present case is not distinguishable from Lambe v. Eames ('), which is an au-

thority entirely in point.

I have been referred to two authorities decided since Lambe v. Eames, and apparently in conflict with it, but they are decisions of inferior courts, and no number of decisions by inferior courts can overrule a decision of a superior court. In my opinion the decision of the Court of Appeal in Lambe v. Eames covers this case, and I shall therefore follow it.

Both on principle and in consonance with the most modern authorities, I decide that the widow took absolutely,

and therefore that the title is good.

Solicitors: Cree & Son, agents for J. Taylor, Bakewell, Pattison, Wigg & Co., agents for Broomhead, Wightman & Moore, Sheffield.

(1) Law Rep., 6 Ch., 597.

See 10 Eng. Rep., 740 note; 4 Quarterly Law Jour., 18, and cases there cited.

A. A. died leaving a last will and testament, whereby he devised and bequeathed as follows: "It is my will and desire, and I hereby devise and bequeath all my property, real, personal and mixed, to my dear wife E. A., and her heirs and assigns forever; and it is my request and desire that my said wife E. A. should, by last will and testament, devise and bequeath all of said property at her death remaining in her possession to my friends B. W. and to

E. W., their heirs and assigns forever, share and share alike." Said E. A. afterwards died without devising and bequeathing to B. W., his heirs and assigns, the balance of said property remaining in her possession at the time of her death, according to the said request of A. A. contained in his last will and testament. The heirs of B. W. accordingly filed their bill of complaint, claiming that the devise and bequest of A. A., to his said wife E. A., created a trust in favor of said B. W. as to such part of said property as should remain in the possession of E. A. at

the time of her death: Held, 1st. That precatory words may create a trust, but the effect of such expressions in creating trusts depends entirely on the supposed intention of the testator, to be gathered from the tenor of the intervent

strument.

2d. That in order to justify a construction of precatory words in a will as creating a trust, it must appear that the property which is the subject of the trust is definite and certain.

8d. That the power of disposition by E. A., implied in the absolute gift of the property to her, was not limited or controlled by the subsequent words, which had reference only to such property as might remain in her possession at the time of her death.

4th. That precatory words will not be construed to create a trust, where the gift to the first devisee is absolute in its terms, followed by precatory words indicating the disposition to be made of what might remain of the property at the death of the first devisee.

5th. That words of recommendation, and other words precatory in their nature, are not to be construed as peremptory, unless by the context of the will that meaning is forced upon them: Williams v. Worthington, 49 Md., 572.

Precatory expressions in a will have been considered as creating a trust where the objects to be benefited are well described, and the property, to which the trust should attach, was sufficiently defined: Clark v. Jacobs, 56 How. Prac., 520.

The prevailing doctrine is, that no particular form of expression is requisite in order to create a valid and binding trust, and words of recommendation, request, entreaty, wish or expectation will have that effect, provided the testator has pointed out with sufficient certainty both the subject matter and the object of the trust: Matter of Smucker's Estate, 61 Mo., 592

Where a testator, in the opening of his will, in view of a dangerous voyage upon which he was about to enter, declared that he deemed it his duty to make a will "for the benefit and protection of my wife and children," who are named; and then, in one connected sentence in his will, disposes of his property and appoints an executor in

these words, "I do, therefore, make this my last will and testament, giving and bequeathing to my wife Caroline all of my property, real or personal, of whatever name or nature it may be in, that I am now possessed of or is owned by me, etc., etc., and do appoint my wife Caroline my true and lawful attorney and sole executrix of this will, to take charge of my property after my death, and retain or dispose of the same for the benefit of herself and children above named." Held, that the gift to the mother was not absolute, but that the children had, with their mother, a substantial interest in the property which a court of equity would recognize and protect: Clark v. Jacobs, 56 How. Pr., 520.

A testator, by his will, devised thus; "All the residue of my property, real and personal, I devise to my wife, requesting her to will the same to our children, as she shall think best." The widow devised the whole of the property to one child out of a number:

Held, that the words were directory, not precatory only; that the power reposed in the widow was not properly exercised, as she was bound to divide the property among all the children, although she might, in her discretion, give personalty to one and realty to another: Finlay v. Fellows, 14 Grant's Chy., 66.

À devise of the residue of the testator's estate to his son, "to have and to hold," "to him, his heirs and assigns forever, to his and their own use," subject to a charge for the support of the wife and of the sister of the testator, followed by this clause, "I hereby signify to my said son my desire and hope that he will so provide by will or otherwise, that in case he shall die, leaving no lawful issue, the property which he will take under this will shall go in equal shares" to certain named relations of the testator, does not create a trust in favor of those relations, but gives the devisee an absolute title: Hess v. Singler, 114 Mass., 56.

A testatrix, by her will, after certain legacies, devised the residue of her estate to J. S., "having full confidence that he will so use and dispose of it as to carry out my wishes in regard to the distribution of my personal estate, as expressed in a memorandum which I

shall leave in his possession," authorized her executor to sell any or all of the real estate devised, without obtaining leave from the probate court, if necessary, "in order to carry out the provisions of this instrument named therein," and appointed J. S. executor. At the trial of a writ of entry, brought by a creditor of J. S. to recover a portion of the real estate taken on execution, it appeared that the executor sold the estate to the tenant without leave of the probate court, claiming to act under the power in the will; the memorandum named in the will was not produced, but oral testimony of the executor was offered to show that the sale was necessary in order to pay debts, legacies and charges. Held, that the executor took the real estate subject to no trust; that the authority given by the will was not a power to sell to pay debts; and that the real estate devised was subject to attachment and levy of execution by the creditors of the devisee: Wells v. Hawes, 122 Mass., 97.

"I devise to my wife all my real and personal estate," for her own use and disposal, trusting that she will make such disposition thereof as shall be just and proper among my children," operates as an absolute devise to the widow, who has the power of conveying such a title to the lands as a purchaser under her vendee is bound to accept: Nelles v. Elliot, 25 Grant's (U.C.) Chy., 829.

A devise by a husband to a wife of his estate, "with a confident expectation that at or before her death she will donate it" to certain societies, does not restrict her right over it, but she may dispose of it as she sees fit: Thomas v. Felt, 32 Leg. Int., 30.

Residuary devise and bequest to the testator's wife, "to be used by her in such ways and means as she may consider best for her own benefit and that of my three children:" Held, that the wife took the testator's residuary estate absolutely, unaffected by any trust in favor of the children: McAlinden v. McAlinden. Irish Rep.. 11 Eq. 219.

McAlinden, Irish Rep., 11 Eq., 219.

A will, "I give and bequeath all my property of whatever kind soever that I may die possessed of to my dearly beloved wife, well knowing her sense of justice, and love to her family, and feeling perfect confidence that she will

manage same to the best advantage for the benefit of her children," does not create a precatory trust for the children, but the wife takes the property absolutely: Greene v. Greene, Irish Rep., 3 Eq., 90, affirmed Id., 629.

A testator left his real and personal property to his wife for her life, with power to dispose of all the property, both real and personal, as she might judge best and wisest, he relying with confidence on her discretion, and that she would make such a disposition or disposal of it as would thoroughly accord with his wishes on the subject, with all of which she was perfectly acquainted. There was some evidence of the testator having communicated some wishes to his wife, but none as to what they were. Held, that the terms of the gift to the wife did not amount to a precatory trust, and that she took the property, both real and personal, absolutely: Reid v. Atkinson, Irish Rep., 3 Eq., 373, reversing Id., 162.

A bequest to executors "in their own right, trusting nevertheless and believing that, under a proper sense of their obligations to their own consciences and their accountability to God, they will, etc., pay over and contribute the same to charitable objects," etc., creates no trust enforceable in a court of equity; the executors take in their own right, amenable only to their own consciences for their disposition of the bequest: Frierson v. General Assembly, etc., 7 Heisk. (Tenn.), 683.

See also Matter of Smucker's Estate, 61 Mo., 592, where it was held a somewhat similar devise was void, and that the heirs-at-law took the property.

"I devise all my real estate to my beloved wife, feeling entire confidence that she will use it judiciously for the benefit of herself and our children," confers upon the wife an estate in fee without trust or limitation over.

The tendency of the modern authorities is not to raise trust out of terms merely expressive of a wish, entreaty, confidence or recommendation: Lessene v. Witle, 5 S. C., 450.

The words, "to my beloved wife the whole of my property, for her own use and benefit, and to maintain and support my said children with, the same to be hers absolutely," do not create a trust, but vest the wife with the abso-

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Gilbert v. Smith.

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lute estate: Estate of Molk, 1 Myrick's

(Prob. Ct.) R., 212.

"To my beloved wife, Emilie Glass, to have and to hold the same or any parcel thereof, with privilege to dispose of the same or any portion thereof, for her use and interest, or those of our be-

loved children," constitute the wife devisee, a holder of the estate in fee and full property. The language is precatory, and cannot be held to create a trust in favor of the children: Estate of Glass, 1 Myrick's (Prob. Ct.) R., 213.

## [8 Chancery Division, 543.] M.R., June 1, 1878.

## In re Poplar and Blackwall Free School.

Practice—Charity School—Charity Trustees—Paying Fund into Court under Trustee Relief Act, without notice to Charity Commissioners—Irregularity—Charitable Trusts Act, 1853, s. 17—Transfer to School Board—Settling Scheme—Aiding Local Rates.

Although sect. 17 of the Charitable Trusts Act, 1858, does not prohibit charity trustees from paying their trust fund into court under the Trustee Relief Act, and thereby relieving themselves from further liability and putting an end to their trust, it is irregular for them to follow that step up by presenting a petition for the administration of the charity funds. In all cases of doubt or difficulty as to the administration of the fund the trustees should apply to the Charity Commissioners under the Charitable Trusts Act before taking any legal proceedings with reference to the fund:

Semble, in settling a scheme for the regulation of the funds of a charity school on \*its transfer to a school board, care should be taken to provide that the [544 funds shall be applied for the advancement of learning in the school—as for instance, by establishing exhibitions or scholarshipe—and not for the general purposes of the school, which would have the effect of a grant in aid of the local rates.

[8 Chancery Division, 548.]

V.C.M., May 20, 21, 1878.

\*GILBERT V. SMITH.

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[1876 G. 18.]

Partition Act (31 & 32 Vict. c. 40), ss. 3, 4, 5—Some Parties Desiring a Sale—Offer by others to Purchase.

In a partition suit the plaintiffs, who were entitled to three-sixteenths of the property, desired a sale by auction, alleging that by no other means could the value of this particular property be ascertained. The defendants, who were entitled to the remaining thirteen-sixteenths, objected to a sale, and offered to purchase the three-sixteenths.

Held, that the case came within the 5th section of the Partition Act, 1868, although it satisfied the conditions of the 8d section, and upon some of the defendants undertaking to purchase, a valuation was directed to be made in chambers, and sale and purchase accordingly.

Drinkwater v. Ratcliffe (1) discussed.

(1) Law Rep., 20 Eq., 528,

25 Eng. Rep.

This was a partition suit, in which at the original hearing the usual reference was made to chambers to ascertain the interests of the various parties in the property sought to be partitioned. The result of the inquiries in chambers was to this effect—that the Chief Clerk had divided the shares into 336 parts, of which the plaintiffs Thomas W. Jones and George Biron, as trustees of a settlement dated in January, 1871, and the plaintiff George Heaton as mortgagee, were entitled to forty-two parts, William Pitt to fifty-nine parts, William Pitt, and Peter Pitt as his mortgagee, to twentyfive parts, the said Peter Pitt to thirty-five parts, Peter Pitt and Joseph Ballard Pitt, as trustees of a settlement dated in July, 1868, to thirty-five parts, Joseph B. Pitt to fifty-six parts, the defendants Mary Smith and Thomas Drinkworth to sixty-three parts, and Henry Sutor and Emma his wife to the remaining twenty-one parts.

It was admitted by both sides that practically the shares might be divided into sixteenths, and that the plaintiffs and others in the same interest were entitled among them to three-sixteenths, while the defendants were entitled to thirteen-sixteenths of the entirety. The property was situate in the centre of the town of Birmingham, where improve-549] ments were going on which it was \*alleged would greatly increase the value of the property. The plaintiffs, being the owners of three-sixteenths, were desirous of having a sale of the property in order that they might receive immediate payment of their shares, while the defendants, the owners of thirteen-sixteenths, were desirous of retaining their shares, and were willing to purchase the plaintiffs'

shares.

The question as to the rights of the parties was argued

upon further consideration.

Bristowe, Q.C., and Lewin, for the plaintiffs are entitled to three-sixteenths of this property, and we say that we have a right to a sale under the 3d section of the Partition Act. The saving clause as to purchase by any of the other parties contained in the 5th section does not apply to cut down the right under the 3d section, but only applies to a case where a person not entitled to a moiety asks for a sale, and where there is no particular advantage to be gained by a sale in preference to a partition.

This is property which from its nature ought to be sold. It is impossible to put a value upon it without a sale, since there are great improvements going on in the town of Birmingham, and the situation of this property is such that it

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The court therefore may command a very high price. ought to exercise the jurisdiction given by the third section. The defendants desire to purchase the plaintiffs' shares, in order that they may have the property at a valuation according to its present value, whereas if sold by auction the full value will be obtained. It was held in Williams v. Games (') that the court has no power under the 5th section of the act to order that the part owner who asks for a sale shall sell to the others, his share, at a valuation. It was laid down in *Drinkwater* v. *Ratcliffe* (\*) that a sale ought to be directed under the 3d section on account of the nature of the property and the number of parties interested, and because a sale would be more beneficial for the parties, which is exactly this case. In Pemberton v. Barnes (\*), where your Lordship had refused to order a sale under the 4th section because it was against the wish of the \*other [550] owners of a moiety, it was held on appeal that a sale must be ordered, for that sect. 4 was imperative, and obliged the court to direct a sale in such a case; and in Roughton v. Gibson (\*) the owner of one portion of an estate was declared to be entitled to have a sale by auction, notwithstanding that the other part owners offered to purchase under sect. 5. In this case the only effectual means of fixing the value is by a sale, and this mode would not be more expensive than having a valuation of the property.

Davenport, for parties in the same interest desiring a sale. J. Pearson, Q.C., and Bardswell, for the defendants: It would be a great hardship upon the parties entitled to thirteen-sixteenths of the property to be driven into a sale by a minority of three sixteenths. We believe that the value will increase, and it is precisely on that account that we wish to avoid a sale at the present time. The 3d section of the act applies to cases where the parties are so unreasonable as to require a partition of property that cannot advantageously be partitioned, but the 5th section is perfectly independent of the 3d section, and applies to a totally different state of things, that is, where the minority desire a sale, and where the majority are willing to purchase at a valuation. We are desirous of purchasing, and the court can without trouble ascertain the value of any property by skilled valuers, who will take into consideration the improving nature of the property. The case of Williams v. Games (') does not apply to this, for there some of the parties wanted a partition. We do not ask for partition or for

<sup>(1)</sup> Law Rep., 10 Ch., 204. (2) Law Rep., 20 Eq., 528.

<sup>(\*)</sup> Law Rep., 6 Ch., 685, (4) 46 L. J. (Ch.), 366,

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sale, but for purchase, and that comes under the 5th section. It has been urged that the court is bound to order a sale, but Vice-Chancellor Wickens decided in Allen v. Allen (') that the court was not bound to order a sale against the wish of the owners of the larger share; and that the onus lay upon the owners of the smaller share, who desired a sale, of showing that it was, under the circumstances, the most beneficial course for all parties.

The expense of a sale would be far greater than a valu-551] ation, \*since it would be necessary to have the title. investigated, and to have conditions of sale prepared. court is not bound to order a sale contrary to the wishes of

the majority who are willing to purchase.

Glasse, Q.C., and Woodroffe, for other defendants objecting to a sale, cited In re Langdale's Estate ('), showing that the court would only order a sale in the absence of "good reason to the contrary," and contended that good reason to the contrary had been shown in this case.

Bristowe, in reply.
MALINS, V.C.: This is a partition suit in which the property is virtually divided into sixteenths. The plaintiffs, represented by Mr. Bristowe, and some other parties in the same interest, who are represented by Mr. Davenport, have amongst them three sixteenths, while the parties represented by Mr. Glasse and Mr. Pearson have amongst them thirteen-sixteenths, making up the entirety. The property, it appears, is situate nearly in the centre of the town of Birmingham, in which certain improvements are stated to be going on, which may or may not have the effect of increasing the value of the property. Mr. Bristowe has, I think, admitted that the only object of his suit is to turn his shares into money, and to ascertain the money value of his three-sixteenths, while the owners of the thirteen-sixteenths do not desire to turn theirs into money at all, but desire to retain the property in specie for various reasons, amongst others, to take the chance of the increased value which they believe will arise from these improvements.

Mr. Bristowe, for his three-sixteenths, says, "I am entitled to have the utmost value that my shares will produce, and that can only be ascertained in one way, namely, by putting the entire estate up to auction, when the public will have an opportunity of bidding for it, and the highest bidder will have it, and I shall have the satisfaction of knowing that the highest price that could be obtained has been ob-552] tained for the property." That is the argument \*on V.C.M.

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The other side say, "This will be a very grievthat side. ous hardship on us to have our property, which we desire to retain, put up to auction merely for the purpose of ascertaining the money value of three sixteenths out of sixteensixteenths." I must say I think it would, in this particular case, be a very considerable hardship; but there are many other cases in which the hardship would not only be considerable, but very grievous. Suppose a property to be held in twentieths—in some cases it might be held in hundredths -the owner of one-twentieth says his circumstances absolutely require that his share should be turned into money, and the nineteen-twentieths say, "This property has long been in the family, and we desire to retain it. Our affections are centred in the enjoyment of this property, and we desire that it should not be sold." Under those circumstances surely justice is completely met by ascertaining the money value of the twentieth which it is desired should be sold, giving the parties who are entitled to the nineteentwentieths an opportunity of buying it, and becoming owners of the entire property. That seems to me to be reasonable. Then, again, cases may occur like Pemberton v. Barnes (1). In that case I took one view and Lord Hatherlev took another view; but I am bound to say, having carefully considered Lord Hatherley's judgment again—not for the first time—and having carefully read my own judgment last night, I am very sorry that Lord Hatherley arrived at the conclusion he did, as I think, in the great majority of cases, instead of working justice it would work the greatest injus-In Pemberton v. Barnes there was a large estate, with a mansion house and nearly 4,000 acres of land, which were perfectly capable of partition. It was a case under the 4th section, which says, upon the request of one of the parties there must be a sale, unless the owner of the other moiety can show good cause to the contrary. I thought that good cause was shown to the contrary, but it was decided that the estate must be sold, because one party desired to have it put up to auction, to ascertain what the greatest value of it was; and so I should be obliged to decide if a similar case came before me, although I should do it with the greatest possible reluctance. I have here a property which, it is contended, falls \*within the 3d [553] section, because of the nature of the property and the number of the parties interested. I agree with Mr. Bristowe in his argument to this extent, that if I were bound here to partition the whole of the property or to direct a sale, then

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the difficulty of partition is admittedly so great that I think practically it could hardly be carried into effect, and I should therefore consider the case within the 3d section. and should direct a sale and not a partition. But then comes the 5th section, which certainly is a most material section, because it seems the Legislature, foreseeing that cases might arise in which the great majority of persons interested in the estate might not desire partition or a sale, but to retain their property, and others might desire to have their shares in money, makes this provision: "In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property." I may, therefore, in this case, which clearly falls within that section, direct a sale on the request of three-sixteenths, represented by Mr. Bristowe, "unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale." Independent of any authority or any decision, what does this mean? Can there be a doubt that it contemplates the very case which I have before me now, that the exigencies of some of the parties require their shares to be turned into money; and the only object is to ascertain the money value of the shares. the argument is, that from the circumstances existing in the town of Birmingham at present, nobody can ascertain the value, and this is confirmed by the affidavit of an auctioneer, Mr. Fellowes, who says that it is difficult, if not impracticable, at present to ascertain the value of such property as this. But, surely, because there is a difficulty about it, it would be a very hard thing that I should oblige the owners of thirteen-sixteenths of a property, out of sixteen-sixteenths, to have their property put up for sale in 554] \*order that I might ascertain the value of three-six-The Legislature says I may have a valuation, and teenths. I must consider the Legislature as having said that a valuation is practicable, and to tell me that because a property is increasing in value I cannot find any one who can tell me what ought to be allowed for the probable increase of value, and that under any circumstances it is impossible for this court to ascertain the value of that property, is going beV.C.M.

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yond anything I ever heard of. I cannot sanction such a notion at all.

Now, therefore, upon the interpretation of the language of the section, apart from any decision, I feel no doubt whatever that these three sections do meet the justice of every case. The 3d section directs that there must be a sale where the nature of the property and the number of the interests render a partition impracticable; the 4th section directs a sale at the request of a moiety, unless good cause can be shown to the contrary; and the 5th section provides for the case of these minute divisions of property, and says that all parties shall not be bound to sell their property where the only object is to ascertain the money value of one

share, which necessarily must be turned into money.

The principle, therefore, is clear, and the act is free from difficulty. Am I, then, prevented from coming to that conclusion by any decided cases? Mr. Bristowe relied very much upon the case of Williams v. Games ('), in which I find Lord Justice James expresses his view of the case exactly as I have done. The decision in that case was a reversal of the Master of the Rolls upon one point, which probably, as Mr. Pearson says, was decided per incuriam; it went as a matter unconsidered. There, there were parties interested in the property in sevenths. The order made ties interested in the property in sevenths. by the Master of the Rolls directed a sale of the twosevenths, and then a partition of the whole. Lord Justice James says this (\*): "It is clear that the act was intended for the benefit of those part owners who want to have a sale"—that is the case of Mr. Bristowe—"in which case the other parties interested who object to a sale"-which are the thirteen-sixteenths here-"may be compelled to buy the shares or have a sale." That is the very thing which is contended here. Not that they must submit to have the whole property sold, but \*they must bu\* the shares [555] or have a sale. Here they have expressed their willingness to purchase the shares. Mr. Bristowe's clients want the money, and Mr. Pearson's clients are ready to find the money to buy the shares, and the only difficulty is to say how much they are to give them. Then Lord Justice James says: "But there is nothing to compel a man to sell his share"-Mr. Bristowe does not want to be compelled, because he offers to sell, his only object is to sell—"The whole section is for the benefit of those who want a sale" that, again, is Mr. Bristowe.—"If the result of a plaintiff asking for a sale of the whole is that he must give up his

<sup>(1)</sup> Law Rep., 10 Ch., 204.

<sup>(\*)</sup> Law Rep., 10 Ch., 205.

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share and have it valued, he may be compelled to move to vary the certificate, and then to appeal to this court, and so be put to much expense on which he did not calculate. He may, on being put to such terms, withdraw his request for a sale and have a partition." I confess that last part I do not quite understand.

Mr. Bristowe: I suppose that means I might, if I liked, withdraw my request for a sale, and insist upon a par-

tition.

Malins, V.C.: Mr. Bristowe relies—I confess I am at a loss to see why-upon the decision of the Master of the Rolls subsequently in the case of *Drinkwater* v. *Ratcliffe* ('). There the case was this: "Property, consisting of a farmhouse and buildings and thirty acres of land, was divisible into thirty-six shares: fifteen of them were vested in eight persons, who desired a sale, six of them being entitled to one-thirty-sixth share each; the remaining twenty-one were vested in a married woman living apart from her husband" —the owners of fifteen shares out of thirty-six desired a sale—"the married woman was in occupation of the farm and opposed a sale, and was willing to give an undertaking to purchase the fifteen shares, but her husband did not join therein." She was separated from him, and she could not have any communication with him. What was the difficulty in the way of the Master of the Rolls? Not that there was not a right conferred by the 5th section, but that no undertaking within the meaning of the act could be given. The Master of the Rolls would not have gone into a long \*discussion upon a question whether she was capable of binding herself by an undertaking if he had come to the conclusion which Mr. Bristowe desires me to come to, that this section has no application whenever any of the holders of a small part of the property desire a sale. It all proceeds upon this: not that the parties interested had no right to buy, on the contrary, the parties interested had a right to buy out the shares of those desiring to sell, but that the married woman who offered the undertaking was incapable of binding herself by it. Those are both decisions in conformity with the conclusion I arrive at here, that in this case, as in all other cases where owners of part of the property, particularly when it is a small portion of the property, desire to turn their share into money, there is a right in the owners of other parts to buy; they are not bound to submit to sell their shares for the purpose of ascertaining what the value of the property is, but they have a right to buy out (1) Law Rep., 20 Eq., 528.

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those who desire to turn their shares into money if they give this undertaking; and it becomes the duty of the court to ascertain what the value is, in order that the parties who desire to retain the property may have an opportunity of paying them out in money. In this case, in my opinion, the proper course for Mr. Bristowe's clients to take is, to name a price which they are willing to take, and the parties who desire to retain the property will of course say whether they are willing to accept those terms. If they decline to do that, then the value must be ascertained in chambers in such a manner as I shall decide, either by consulting a single valuer, or by having two valuers with power to appoint an

umpire.

Of course I shall direct whoever values this property to value it having regard to all the surrounding circumstances, and to take into consideration the probable increase in the value of the property by the contemplated improvements in the town of Birmingham. Mr. Bristowe says that this would be quite as expensive as putting the property up to auction. Mr. Bristowe may think so, but I cannot agree with him as to that. I am told that the expense of putting it up to auction would be £700 or £800, and I dare say it would, because there would have to be an investigation into the title, which is expensive, and I must have the conditions of sale drawn with reference to the state of the title. Auctioneers must \*be employed, commissions paid, and advertisements [557] issued. If I cannot get this property valued for 100 guineas I shall be greatly surprised. Therefore I am quite satisfied that I can comply with what the Legislature has imposed upon me in order to ascertain the value of the property, and having ascertained the value of the property, the defendants represented by Mr. Glasse and Mr. Pearson must undertake to purchase at the value so to be ascertained.

J. Pearson: We will undertake to do that, my Lord. My clients are the owners of five-eighths. The act says, "the parties or some of them," and in the words of the act my clients undertake to purchase. The persons are suijuris. They are Peter Pitt, Joseph Ballard Pitt, and William Pitt, who will give the undertaking. A similar decree was made by the Master of the Rolls in Williams v. Games ('), "that certain of the defendants undertaking to purchase the two-sevenths, a valuation thereof should be made in chambers." Then we will accept the title subject to the plaintiffs showing that their shares are free from incumbrance since

the date of the Chief Clerk's certificate.

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Bristone: There is a further difficulty, which is this. The 3d section proceeds upon the footing of the sale being at the request of any of the parties interested. It will be necessary to preface the order by the names of the parties who desire it. If it is under the 5th section that request would be unnecessary. We do not ask for a sale under the 5th section, but under the 3d section. Rather than go under the fifth section, I would withdraw my request for a sale of

the property.

Malins, V.C.: I cannot have the parties argue strenuously for a sale of the property, and then, when they find the order does not suit them, turn round and say they do not wish for a sale. I will not allow the request to be withdrawn. I will have the order prefaced with the words, "The plaintiffs and the parties represented by Mr. Davenport requesting a sale, and all the other parties resisting a sale and not desiring a partition, and Peter Pitt, Joseph B. Pitt, and 558] William Pitt undertaking to purchase the \*shares of the parties desiring a sale, order valuation of such shares to be made at chambers, and sale and purchase accordingly. The conveyance to be settled in chambers if the parties differ. The costs of suit and of carrying the decree into effect to come out of the estate ratably in proportion to the shares.

Solicitors: Letts Brothers; Gamlen & Son, agents for Cottrell & Son, Birmingham; Robinson & Preston; Milward & Whitehead.

[8 Chancery Division, 558.]

V.C.M., May 22, 1878.

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[1874 B. 8.]

Devise of Land—Bequest of Money to same Uses—Revocation of Devises—No implied Revocation of Bequest.

A testator devised freeholds in Dorsetshire upon certain trusts, and bequeathed £3,000 to his trustees to purchase lands in Dorsetshire to be held upon the same trusts. By a codicil he revoked the devise of his freeholds, and declared other trusts without alluding to the £3,000:

Held, that there was no implied revocation of the bequest of £3,000, which would

pass under the will as if no codicil had been made.

WILLIAM PAGE, by his will, dated the 31st of March, 1852, amongst other things, gave his freehold lands and hereditaments in the parishes of Stoke Abbot and Burstock, in the county of Dorset, to three trustees and their heirs, to the

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use of his second daughter, the defendant Elizabeth J. Strachan, and her assigns for her life, with remainder to the use of her first and other sons in tail, with subsequent remainders over. The testator also gave and bequeathed to his trustees the sum of £3,000 consols upon trust to lay out the same in the purchase of lands in the county of Dorset of not less value than £2,000, and to be held in fee simple or for a term of years of which at least 100 should be unexpired, and to settle the estates so to be purchased to the same uses and subject to the same powers and authorities as were expressed and declared by his will of and concerning his lands and hereditaments situated in the said county of Dorset, and if the whole £3,000 should not be expended in the said purchase, then to lay out and expend the residue in the erection, enlargement, or repair of buildings, or in \*any other permanent improvements on the lands and [559] hereditaments in the county of Dorset, or such estates so to be purchased as the trustees should think expedient, and if any surplus still remained, to pay the same over to the person who should for the time being be tenant for life of the Dorsetshire lands and hereditaments for his own use and benefit.

By a codicil to his will dated in February, 1854, the testator revoked the devise in his will contained of his free-hold hereditaments in the county of Dorset, and in lieu thereof he gave the same to the use of his trustees and their heirs until the defendant Augustus Strachan, the first and eldest son of Elizabeth J. Strachan, should attain the age of twenty-one, with remainder to the use of Augustus Strachan and his assigns for life, with remainder to the use of his first and other sons in tail, with remainders over as directed by his will.

The testator died in April, 1861. Elizabeth Strachan was a widow and had four children, all of whom were defendants. No part of the £3,000 had been yet invested in lands.

The principal question now argued upon further consideration was whether, the devise of the Dorsetshire estates having been revoked by the codicil, the gift of the £3,000 to be laid out in the purchase of lands in Dorsetshire to be held upon the same trusts, was revoked by implication.

Dickins, for the trustees, stated the case.

W. Barber, for Elizabeth Strachan, the second daughter of the testator: There is no express revocation of the gift of £3,000 in the codicil, and without such express revocation the gift remains, notwithstanding the revocation as to the freeholds. The revocation only applies to part of the trusts.

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By the will a life estate is given in the freeholds to Elizabeth Strachan, and by the codicil there is a direction to accumulate the rents until her eldest son comes of age.

In the case of Darley v. Darley ('), where there was a devise of freeholds and a bequest of leaseholds to be con-560] veyed to the same \*uses, and the testator afterwards suffered a recovery by which the devise of the freeholds was revoked, it was held that the bequest of the leaseholds was also revoked, but this decision was reversed in the House of Lords in Darley v. Langworthy (\*); and in Francis v. Collier (\*), where a testator directed freehold estate to be sold and applied on the trusts of the residuary personal estate, and then revoked by codicil the gift of the residuary personal estate, it was held that the freehold estate went upon the uses expressed as to the residuary personal estate: Theobald on Wills (').

Colquhoun, for the eldest son of Elizabeth Strachan: evident intention of this testator was that the £3,000 should be applied in increasing the property already held by him in Dorsetshire, and when he revoked the life estate to his daughter as to the freeholds he must have intended that revocation to extend to the money to be applied for the ad-

vantage of the Dorsetshire estate.

In Lord Carrington v. Payne (\*), where there was a devise of lands, and a bequest of personal estate to be laid out on land to be settled to the same uses, and a subsequent revocation of so much as settled the real estate on the sons and a variation of the uses, it was held not to be a revocation, but substitution of other uses, and therefore to extend to the estate to be purchased with the personal estate. In re Gibson's Trusts (\*) also supports this view that the gift of the £3,000 is revoked by implication: Jarman on Wills (').

T. H. Kekewich, for the other defendants.

MALINS, V.C.: The question I now have to decide is whether the revocation by the codicil, of the devise of the freehold estates in Dorsetshire acts as an implied revocation of the gift of £3,000 to be laid out in the purchase of lands in Dorsetshire, to be settled to uses similar to those of the freehold estates in Dorsetshire. It may be that the testator intended to revoke the latter gift of £3,000, and I think in 561] \*all probability his object was to extend the Dorsetshire estate, but he has omitted any reference to the

<sup>(1)</sup> Amb., 658.

<sup>(&</sup>lt;sup>2</sup>) 3 Bro. P. C., 859.

<sup>3) 4</sup> Russ , 331.

<sup>(4)</sup> Page 424.

<sup>(5) 5</sup> Ves., 404.

<sup>6) 2</sup> J. & H., 656.

<sup>(&</sup>lt;sup>1</sup>) 8d ed., p. 167.

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£3,000 in his codicil. Therefore on principle there is no implied revocation. I think that notwithstanding the case of Lord Carrington v. Payne ('), no revocation takes place unless a clear intention is expressed. Darley v. Langworthy (') supports that view, and the last case cited by Mr. Barber of Francis v. Collier (') is in conformity with that principle.

I think, therefore, that the rights of the parties are the same with regard to the £3,000 as if the codicil had never been made, and that Elizabeth Strachan is entitled for life

under the bequest in the will.

Solicitors: Trinders & Curtis-Hayward; Hadden, Woodward & M' Leod.

(1) 5 Ves., 404.

(3) 8 Bro. P. C., 859.

(8) 4 Russ., \$81.

[8 Chancery Division, 561.]

V.C.M., June 1, 1878.

SMYTH V. SMYTH.

Will-" Sheep and all the Rest, Residue, and other Effects"-Freehold Estate included.

A testator gave two legacies, and then gave his sheep and all the rest, residue, moneys, chattels, and all other his effects, to be equally divided among his four brothers, whom he appointed his executors:

Held, that all the freehold as well as personal estate of the testator passed under these words.

HENRY SMYTH made his will on the 24th of February, 1852, in these word: "I give unto Miss Sarah Ann Banbury the sum of £100, also I give to my brother John Smyth the sum of £50, and lastly, I give my sheep and all the rest, residue, moneys, chattels, and all other my effects, to be equally divided among my brothers John Smyth, James Smyth, Richard Smyth, and William Smyth, whom I hereby constitute and appoint as the sole executors to this my last will and testament."

The father of the testator had died in December, 1851, two months before the date of this will, and had devised certain

real estate to his son.

\*This action was one for partition, and a question [562 was now raised upon further consideration whether the real estate of the testator, Henry Smyth, passed under his will or whether it descended to his heir-at-law.

J. Pearson, Q.C., and E. Harrison, for the heir-at-law of the testator: We contend that the real estate which the testator had does not pass under this will. There is no

doubt that in some cases the words "rest, residue, and effects" would be sufficient to include real estate, but this is not so unless you can discover an intention on the part of the testator to include something beyond personal estate. There is no expression whatever in this will to show that the testator intended to deal with anything but personalty, and in the absence of such expressed intention the heir cannot be disinherited. The father of the testator died shortly before the date of his son's will, and there is no evidence to show that the testator even knew that he was entitled to any real property. The words he uses are applicable especially to chattels—his sheep, moneys, chattels and all other his effects, showing that he meant the word "effects" to include things ejusdem generis with those articles he had specified.

The cases in support of this view are Bebb v. Penoyre ('), Camfield v. Gilbert (1), Doe v. Rout (1), Doe v. Dring (1), and

Doe v. Earles (\*).

Hinde Palmer, Q.C., and W. Karslake, for the legatees: When a testator sits down to make a will it may be supposed that his intention is to dispose of all that belongs to him, and there is nothing in this will to induce any one to suppose that this testator did not intend to carry out that ob-He was a farmer, and evidently not versed in legal phraseology. He first thought of his sheep, which no doubt constituted in his mind his most valuable property, and then he used words which to any ordinary mind would 563] include every earthly thing he possessed: \*all the rest, residue, moneys, chattels and effects; that must mean all the rest and residue of his property; and if he had said that and no more, the real estates must have passed without question. It was held in King v. George (\*), that an enumeration of particular articles did not abridge or cut down the effect of general words. There is nothing in this will to restrict the meaning of "rest and residue;" and the word "effects" was held to pass real estate in Milsome v. Long (').

The opinion of the Master of the Rolls in *Tichfield* v. Horncastle (\*) is strongly in favor of real estate being included in "effects," though it was not necessary to decide that question. In Doe v. Langlands (') the words "all and every the residue of my property, goods and chattels," passed real estate; and the words "real effects" were held

<sup>(1) 11</sup> East, 160.

<sup>&</sup>lt;sup>9</sup>) 3 East, 516.

<sup>&</sup>lt;sup>3</sup>) 7 Taunt., 79.

<sup>(4) 2</sup> M. & S., 448. (5) 15 M. & W., 450.

<sup>(6) 4</sup> Ch. D., 435; 20 Eng. R., 665; 5

Ch. D., 627; 22 Eng. R., 364.
(†) 3 Jur. (N.S.), 1078.
(\*) 7 L. J. (Ch.), 279.
(\*) 14 East, 370.

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in Jackson v. Hogan (') to pass the inheritance of the testator's real estate; that case was referred to and followed in

Lord Torrington v. Bowman (\*).

In the case of Glover v. Chancellor (2d May, 1876), your Lordship expressed an opinion that the word "effects" would carry real estate, and the following cases are in favor of our contention, Attree v. Attree ('), and Jull v. Jacobs ('); and the observations in Jarman on Wills (').

These later cases have superseded the old authorities. J. Pearson, in reply, cited Bowman v. Milbanke (\*).

Malins, V.C.: The testator in this case having both real and personal estate, the question is, whether the words of his will are sufficient to pass real estate. It is contended by Mr. Pearson and Mr. E. Harrison that they are insufficient for the purpose, and by the other side it is argued that

the words will pass real estate.

Now in the construction of wills it is the duty of the court, in the first place, to ascertain from the words used by the testator what his meaning was, and to give effect to that meaning if words \*are to be found sufficient for the purpose. What, then, was the intention of the testator? My opinion is that the testator could not have intended to die intestate, but he intended to dispose of everything he had in the world. I believe in using the words "all the rest and residue" he meant the rest and residue of everything, that is, all the property of every description which he had not already given away. Then he adds, "moneys, chattels, and all other my effects." It has been argued that the word "effects" will not pass real estate. Why it should not I cannot tell, but I certainly do not agree with the argument. There is the decision of Doe v. Dring ('), which is no doubt the decision of a very eminent judge, Lord Ellenborough, but, like all judges at that period, he felt himself bound by the peremptory rule of law, "that the heir shall not be disinherited unless by plain and cogent inference arising from the words of the will." There the words were, "I do give and bequeath to my wife Elizabeth all and singular my effects of what nature or kind soever, to her own use and enjoyment during her life, and at her death to be equally divided between our surviving children."
Lord Ellenborough in that case had no doubt that it was the intention of the testator to convey all his property, both

<sup>(1) 3</sup> Bro. P. C., 888.

<sup>(\*) 22</sup> L. J. (Ch.), 236.

<sup>(3)</sup> Law Rep., 11 Eq., 280. (4) 3 Ch. D., 703; 18 Eng. R., 770,

<sup>(8) 2</sup>d ed., chap. xxii, p. 622.

<sup>(°)</sup> Lev., 180. (°) 2 M. & T., 448.

real and personal, for the maintenance of his family, but he felt himself compelled to decide that the words would not pass real estate. So, because the testator called his property "effects," it was decided that nothing but personal property could pass. Lord Ellenborough there said he never knew of a case in which the court had been called upon to hold that effects would pass real estate denuded of all context, unless, indeed, the words "of what nature or kind soever" could be considered to explain it. although the testator says "of what nature or kind soever," yet it was decided that only chattels passed. Mr. Justice Bayley in that case says, "I have considerable doubts upon this case." Then he says the word "effects" might be made to pass the real, or might be confined to personal estate, according to the context, but "effects" per se had never been held to pass real property, and so they came to the conclusion that the real estate did not pass, although they admitted that the testator intended to give the whole of his property. \*In the case of Glover v. Chancellor I expressed my dissent from that decision, and I do again express my dissent from it, and in such a case I should decide that everything passed. Then, Mr. Pearson relied on other authorities which are, in my opinion, entirely exploded.

The first was the case of *Bebb* v. *Penogre* ('), where the words were "all the rest and residue," and they were held not to pass real estate, because the words followed a direction for the sale of the lease of his house and his furniture,

and appointed executors.

The next case was Camfield v. Gilbert (\*), where the words were still stronger. "I will, bequeath, and devise all the rest, residue, and remainder of my effects, wheresoever, and whatsoever, and of what nature, kind, or quality soever." Yet these words were not sufficient. Although it is admitted that the word "devise" is technically considered as more applicable to real than to personal estate, still here, also, from this principle of favoring the heir-at-law, it was decided that the real estate did not pass.

There is, also, one more decision in favor of the views held at that time of day, namely, the case of *Doe* v. *Rout* (\*). There the words were, "all my stock-in-trade, household goods, wearing apparel, ready money, securities for money, and every other thing my property of what nature or kind soever;" in other words, it was a gift of every other part of his property: and there, again, it was held that the words

did not pass real estate.

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Those are the principal cases decided in favor of the plaintiff's contention, that the words do not pass real estate. Then we come to cases of a different description, all decided at a much more recent period. But, first, I will ask what is the duty of the court in construing a will? The duty is first to find out the meaning of the testator; and on that subject I have no hesitation in expressing my conviction that this testator intended to dispose of all his property. If he had only said all his property and all his effects, I think there can be no doubt that those words would have passed everything he had; but when he says, "I give all the rest and residue," meaning all he had not disposed of, that is said not to pass the whole of his property.

\*The first case I will refer to, which has been cited [566 by the defendant's counsel, is King v. George ('), where the testatrix said: "I do bequeath to A. G. all that I have power over," and then she goes on to enumerate certain articles, "namely, plate, linen, china, pictures, jewelry, lace," intending there should be no mistake about those articles being included. I had there to decide whether the generality of expression, "all that I have power over," was cut down by an enumeration of particular articles. I held that the general bequest was not to be cut down, and that decision was affirmed by the Court of Appeal.

Now, as regards the earlier cases, I have expressed my opinion that those cases, although decided by great judges, were decided at a time when there was that extraordinary leaning in favor of the heir-at-law. I believe, however, that they are not now considered as authorities, and I unhesitatingly express my opinion that they are no longer law.

The decisions in more recent times have been very different, and are much more liberal in the construction of wills. In the case of Jull v. Jacobs (\*) I considered that there was an intention on the part of the testator to dispose of a particular part of his property in each paragraph, and looking at the whole frame of the will I thought the testator meant to dispose of the remainder of that subject which was mentioned in a particular paragraph. Then with regard to Attree v. Attree (\*), I said that although I came to the conclusion that there was no general residuary gift, I should have had no difficulty in deciding otherwise in Attree v. Attree, because there the testatrix, after a gift of her house and garden, which were leasehold, and several pecuniary legacies, directed that "all the rest" should be divided be-

<sup>(1) 4</sup> Ch. D., 485; 20 Eng. Rep., 665; 5 (2) 8 Ch. D., 703; 18 Eng. Rep., 770. (3) Law Rep., 11 Eq., 280, 25 Eng. Rep. 61

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tween certain persons, and it was held that the words included realty as well as personalty.

The same doctrine was applied in Milsome v. Long ('), where Lord Hatherley, then Vice-Chancellor, held that the words "stock-in-trade, money, book debts and effects" carried the reversion in real estate; and in Titchfield v. Horneastle (\*) the Master of the \*Rolls expresses an opinion very much in accordance with what I have said. Lord Langdale there observed: "A great deal might be said as to the meaning of the word 'effects.' It was understood by Lord Mansfield to be equivalent to property or worldly sub-It has been certainly considered that its primary interpretation is to be confined to personal estate only, and that unless it is connected with some other words it will not comprise real estate. I do not mean to express any opinion of my own on that subject. I am not aware that the word 'effects' may not be as applicable to real estate as to personalty, but I do not think it necessary to give any decision on such a point." Lord Langdale must have thought, as I think, that the word "effects" would carry every sort of property which the testator had. Doe v. Langlands (\*) is not applicable to the present case.

Then Mr. Pearson, in reply, cited the case of Bowman v. Milbanke ('), in which the words were, "I give all to my mother, all to my mother," and the court said, "All' is altogether uncertain, and not sufficient to disinherit an heir," and it was decided that lands did not pass. If those words did not pass all the testator had, I cannot conceive what they did pass. However, such a decision as that cannot be con-

sidered an authority now.

The doctrines of the court are more liberal at the present day. I am glad to find that the views I have expressed are supported by Mr. Jarman, who says, after referring to the cases I have cited ('), "The last cases are certainly important authorities, and they demonstrate the inclination of the courts at the present day to hold lands to pass under words capable per se of comprehending them, notwithstanding their association with terms applicable to personalty only. To reconcile all the cases would require the adoption of some very subtle and unsubstantial distinctions; but the preceding review will convince the reader of the necessity of withholding implicit reliance from some of the early decisions in which the restricted construction prevailed."

<sup>(1) 8</sup> Jur. (N.S.), 1073.

<sup>&</sup>lt;sup>2</sup>) 7 L. J. (Ch.), 279.

<sup>(8) 14</sup> East, 870.

<sup>(4)</sup> Lev., 130.

<sup>(5) 3</sup>d ed., p., 693.

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My duty is to look at the words; and finding here a man, a farmer unacquainted with law, using words which in the ordinary acceptation would mean everything he had, and intending, as I \*believe, to give his property generally, [568]

I will do what I can to carry out his intention.

By these words, "I give all the rest, residue, moneys, chattels, and all other my effects," I am of opinion that the testator meant to include everything he had in the world, whether real property or personal property, and to pass all the residue of every kind soever not otherwise disposed of; and I also think that the testator did not intend to die intestate as to any of his property, but to pass everything under his will. The costs will be costs in the cause.

Solicitors for plaintiff: Guscotte, Wadham & Daw.

Solicitor for defendants: T. Sismey.

[8 Chancery Division, 569.] V.C.B., May 9, 1878. \*HODSON V. MOCHI.

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[1877 H. 809.]

Pleading-Counter-claim-Rules of Court, 1875, Order XXII, r. 9.

To an action by executors for the purpose of charging a married woman's separate estate with a debt to their testator contracted on the faith of such separate estate, the husband, who had been made a defendant, and his wife raised a counter-claim for money belonging to the wife, not part of her separate estate, and for certain chattels in the possession of the testator at his death, which it was alleged were the property of the husband:

Held, on motion under Rules of Court, 1875, Order xxII, rule 9, that the claim to

the chattels and money was a proper subject of counter-claim.

MOTION on behalf of the plaintiffs that the counter-claim of the defendants A. E. and Giovanni Mochi, so far as it sought to establish the claim of G. Mochi to certain property might be struck out, or, in the alternative, that G. Mochi might be ordered to give security for the costs of the counter-claim.

By their action the plaintiffs, as executors of General Hodson, claimed payment of a sum of £587 10s. 5d. as a debt due to their testator for advances made by him in April and August, 1876, to the defendant Agnes Elizabeth Mochi, on a stipulation for repayment out of her separate estate.

Mrs. Mochi was entitled, under the will of her first husband, to an annual income of £600 for her sole and separate use, independently of her present husband, Giovanni Mochi, whom she married in 1874. General Hodson had, from 1872 until 1876, boarded with Mrs. Mochi in various places in England and France. In 1876 Mrs. Mochi left England to

join her husband at Santiago, in Chili, where he held an appointment. The plaintiffs, by their statement of claim, alleged that Mrs. Mochi, in 1876, before she left for Chili, borrowed considerable sums from General Hodson, and that in April and August of that year the general advanced her two sums of £224 and £350, it being stipulated that these advances should be repaid out of her separate income at the rate of £150 a quarter. The defendant Giovanni Mochi, as the husband of Agnes Mochi, had been joined with her as

a defendant to the action.

\*By their statement of defence the defendants denied that any sum was due from Mrs. Mochi to the plaintiffs in respect of her separate estate or otherwise. Small sums of from 200 francs to 300 francs were occasionally borrowed by her from General Hodson, but were invariably repaid. by way of counter-claim the defendants stated that General Hodson had in his possession at the time of his death four paintings belonging to the defendant Giovanni Mochi; that shortly before General Hodson's death Mrs. Mochi sent him 500 francs, with a request that he would discharge some liabilities on her behalf. The letter arrived in England after General Hodson's death, but he had in his lifetime discharged a portion of such liabilities to the amount of 100 francs. 500 francs and also the pictures had come to the hands of and were retained by the plaintiffs as his executors, and by their counter-claim the defendants claimed a delivery of the four pictures and payment of the balance of 400 francs.

Russell Roberts, in support of the motion: The husband, against whom no relief is prayed, but who has been made a mere formal defendant, has taken advantage of this to set up a counter-claim amounting to an action for detinue in respect of four pictures in the plaintiffs' possession alleged to belong to him. This counter-claim, which under the Rules of Court, 1875, Order XIX, rule 3, has taken the place of the old cross bill, is wholly irrelevant to and does not touch the subject-matter of the original action, which is a claim against the wife's separate estate only. Under the old practice a cross bill, so called, which was not a defence to anything contained in the original bill but raised a totally independent case, not touching the same matter, was demurrable. Moss v. Anglo-Egyptian Company ('); Mitford on Pleading ('); and by Order xxII, rule 9, where the claim raised by the counter-claim ought not to be disposed of by way of counter-claim but in an independent action, the plaintiff is entitled to apply that such counter-claim may be excluded.

<sup>(1)</sup> Law Rep., 1 Ch., 108.

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Yate Lee, for the defendants, was not called upon. \*BACON, V.C.: I can find no pretence at all for the present application. The Judicature Acts were intended to simplify procedure in actions and to diminish expense, and if I were to yield to this application I should be making them acts to encourage chicanery. The husband is a necessary party, and in their defence and counter-claim he and his wife state that General Hodson (now represented by the plaintiffs, his executors) had in his possession certain pictures belonging to the husband and a balance of 400 francs, and they claim the delivery up of these pictures and money. In my opinion this is a very suitable subject for a counter-claim, and the motion must be dismissed with costs.

Solicitors: H. J. Mead; Hayes, Twisden & Co., agents for R. S. Hawkins, Oxford.

> [8 Chancery Division, 571.] V.C.B., May 21, 22, 1878.

## School Board for London v. Faulconer.

[1877 L. 17.]

Charity Estate—Scheme—Appropriation of Income in aid of Expenses of a School— Transfer of School to a School Board—Right of School Board to the Endowment— Elementary Education Acts, 1870, 1873 (38 & 34 Vict. c. 75, s. 28; 36 & 87 Vict. c. 86, s. 13).

By the terms of a scheme, approved in 1852, for appropriation of the increased revenues of a charity estate originally applicable to the relief of the poor, it was provided that a sum of £90 should be paid by the charity trustees to the treasurer of a school association in aid of the expenses of a school in Flint Street, Walworth, or any other school that may be established in its stead," provided that no sum should be paid to any denominational school; and that if such school should "become materially altered in discipline, number of children, or other circumstance," then the £90 should "in the discretion of the trustees" be applied "for educational purposes amongst other schools of a similar character" in the parish.

A transfer of the Flint Street School and its endowment having been made by the

managers to the School Board for London:

Held, that the Flint Street School had not by the fact of such transfer become "materially altered in discipline, number of children, or other circumstance;" and that the trustees were bound to pay the endowment of £90 a year to the School Board.

By an order of the Court of Chancery, dated the 25th of June, 1852, and made in the matters of certain specified charity estates, \*which were portions of the copy- [572 hold charity estates of the parish of St. Mary, Newington, Surrey, a scheme for the appropriation of the increased revenues of the charities was approved of.

Clause 4 of the scheme was as follows:—

"That the sum of £90 a year be paid" (by the charity trustees) "to the treasurer for the time being of the St. Mary, Newington School Association, for the education of the children of the poor of every religious denomination, to be appropriated by the committee for the time being of such association in aid of the charges and expenses attendant upon carrying on the school in Flint Street, Walworth, or of any other school that may be established in its stead, provided that no sum shall be paid to any school which shall become the property of any exclusive denomination or sect, or exclude by reason of its regulations the children of any class or denomination of persons."

The 10th clause was as follows:-

"That as to £300 a year to be appropriated to the respective schools mentioned in clauses 4, 5, 6, 7, 8, and 9, if either of such schools shall not at any time hereafter or from time to time fall substantially within the description of school, or within the terms of such grant, or if such school shall become materially altered in discipline, number of children, or other circumstance, then the application of so much of the £300, the proportion of such school, shall in the discretion of the trustees be in the appropriation of such trustees for educational purposes amongst other schools of a similar character in the said parish, subject to the same conditions or provisions as contained in the said 4th clause."

The 11th clause provided for the application of funds not

appropriated by the previous clauses.

Under the above scheme the Flint Street School, Walworth, was, until the year 1873, carried on under the direction of managers, the expenses being partially defrayed by annual subscriptions. The sum of £90 a year, being "the proportion" above mentioned of the Flint Street School, was always paid to the managers by the trustees for the time being of the charity estates.

In the year 1870 the first Elementary Education Act (33 573] & 34 \*Vict. c. 75) was passed, which enables managers of any elementary school to transfer their school to a School Board; and the following clauses of the enabling

section became of importance in this case:—

Sect. 23. "The managers of any elementary school in the district of a school board may, in manner provided by this act, make an arrangement with the school board for transferring their school to such school board, and the school board may assent to such arrangement"....

"An arrangement under this section may provide for the

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. . . . transfer or application of any endowment belonging to the school, or for the school board undertaking to discharge any debt charged on the school not exceeding the value of the interest in the school house or endowment transferred to them."

"When an arrangement is made under this section, the managers may, whether the legal interest in the school house or endowment is vested in them or in some person as trustee for them or the school, convey to the school board all such interest in the school house and endowment as is vested in them or in such trustee, or such smaller interest as may be required under the arrangement."

In 1873 an arrangement for the transfer of the Flint Street School, Walworth, to the School Board for London, and of the premises in which the same was carried on, and of the above mentioned endowment of £90 a year, was duly made under the act of 1870, and was duly approved according to the provisions of the act, by the School Board, the managers of the school, the subscribers to the school, and the Education Department of the Privy Council; and by an agreement, dated the 23d of September, 1873, and made between the then managers of the first part, the trustees of the school premises of the second part, and the London School Board of the third part, it was agreed as follows:—

"1. The managers hereby transfer the school to the board, and the managers and trustees agree to assign to the board, and the board agree to accept an assignment of the school house and premises.

"2. The managers shall, so far as they lawfully can, transfer absolutely to the board the said endowment of £90

per annum.

"3. Possession of the school house, and of the [574 school books, furniture, and effects now therein, shall be given to the board on the day of the date hereof, from which date the board undertake the exclusive management of the school, and the school shall thenceforth be deemed to be a school provided by the board within the meaning of the said Elementary Education Act, 1870 . . . .

"6. The board, in consideration of the transfer to them of the said endowment of £90, shall pay to Mr. Thomas Watson, the present master of the school, an annuity or yearly

sum of £100 during his lifetime.

"7. The board shall also, for the said consideration, in case Priscilla Watson, the wife of the said Thomas Watson, shall survive her said husband, pay to her an annuity or

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yearly sum of £60 from the date of her husband's death for and during the remainder of her lifetime."

By an indenture dated the 4th of June, 1875, and made between the managers of the first part, the trustees of the school premises of the second part, and the London School Board of the third part, the trustees, at the direction of the managers, assigned, and the managers assigned and confirmed, to the London School Board the premises on which the school was carried on, subject as therein mentioned; and the managers, "so far as they lawfully could," assigned to the School Board the endowment of £90, with power in the names of the managers to sue for and recover the same.

In accordance with the above agreement of September, 1873, the London School Board took, and had ever since been in, possession of the Flint Street School, Walworth.

The writ in this action was issued by the London School Board against the trustees of the St. Mary, Newington Charity Estates; and the statement of claim alleged that the school under the plaintiffs' management was not the property of any exclusive denomination, but had continued to be and fell within the description of school mentioned in paragraph 4 of the scheme; and that the school had not become "materially altered in discipline, number of children, or other circumstance."

The claim then alleged that the plaintiffs had requested the defendants to pay the annual sum of £90 to them, but 575] that the \*defendants refused to make such payment, and claimed a declaration that the plaintiffs, as transferees and managers of the school, were entitled to receive out of the income of the charity estates the annual sum of £90, which by the order of June, 1852, was directed to be paid to the treasurer for the time being of the St. Mary, Newington School Association.

The statement of defence, after describing the origin of the charities, showing that they were at first intended for the relief of the poor, went on to allege that the Flint Street School had become "materially altered" in circumstances within the meaning of paragraph 10 of the scheme; that, the original object having been to give special advantages to the poor of St. Mary, Newington, in furtherance of such objects, part of the income was appropriated to the local schools, whereby poor inhabitants obtained advantages which they would not otherwise have had; that the payment of the £90 a year to the School Board would give to the poor inhabitants no greater advantage than they would

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have if no such payment were made; that the payment would go into the general funds of the board; that no diminution would be made in the school fees, and that no benefit to the parish would accrue except a small diminution in the general rates, their proportion of which would amount to about 27s. a year.

The defence further alleged that the payment of a pension to the superannuated head master and his wife was contrary to the scheme and the original object of the charity.

The defendants submitted that this £90 a year was not an endowment which the managers were enabled by the statute to transfer; that the Flint Street School had ceased to be a local school, and was now one of the general schools of the metropolis; and that the £90 a year was otherwise required for the benefit of the poor of the parish, and ought to be so applied.

For the plaintiffs it was proved that the character of the school remained unaltered, except that girls were admitted as well as boys; that the numbers had somewhat increased, especially from within the parish, and that the efficiency of

the school was improved.

Mr. Burgess, the clerk to the defendants, and to the trustees of \*the other charity estates in the parish of St. [576 Mary, Newington, deposed as follows:—

"If the £90 a year in the pleadings referred to were paid to the plaintiffs, the poor inhabitants of the parish would derive no advantage therefrom. Their position would be practically the same as if no such payment were made. The payment would go into the general funds of the board, which are applied generally for the benefit of all the board schools of the metropolis, and no diminution would be made in the school fees in the parish of St. Mary, Newington, or other benefit accrue to the schools in the said parish by the £90 a year being paid to the board.

"I have calculated the amount of diminution of the rates for the School Board which would be effected by the board's independent income being increased by £90; and I find that such diminution would, so far as the parish of St. Mary, Newington, is concerned, be represented by a diminution of the rates in that parish of 27s. a year only, or thereabouts.

"There are many charitable objects within the 11th clause of the scheme of 1852 to which the £90 a year might be usefully applied."

In an affidavit in reply, Sir C. Reed, the chairman of the board, said:—

25 Eng. Rep.

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"If the £90 a year in the pleadings mentioned is paid to the plaintiffs, it has always been, and is, intended by the plaintiffs, not to allow it to go into the general funds of the plaintiffs, but to apply it for the benefit of the Flint Street

School in particular.

"On the 16th of January, 1878, the following resolution was passed at a meeting of the plaintiffs, in the manner required by law, viz.:— That the School Board will apply the sum of £90 a year when received from the Elephant and Castle Charity Estates and the King and Queen Charity Estate, in connection with the education of children attending their school in Flint Street, Walworth (Lambeth), until other application thereof shall be directed by lawful authority.'

"Some years ago the plaintiffs were advised by counsel 577] that by \*virtue of an arrangement for transfer made under the 23d section of the Elementary Education Act, 1870, any endowment transferred to the plaintiffs must not be allowed to go into the general funds of the plaintiffs, but must be applied for the benefit of the said particular school to which the endowment had previously to such transfer belonged.

"By means of such application as aforesaid, the poor inhabitants of the parish of St. Mary, Newington, will derive large benefit from the said sum of £90 a year. Their position will not be practically or at all the same as if no such payment were made. On the contrary, they will, by reason of such payment and such application thereof as aforesaid, be in a very different position from that of the poor inhabi-

tants of neighboring parishes.

"Their position will also be much more favorable than it was before the plaintiffs were constituted, inasmuch as they will have the special benefit hereinbefore mentioned in addition to the ordinary benefits of one of the plaintiffs' schools (which are at least equal in merit and efficiency to the Flint Street School previous to its transfer to the plaintiffs), and to the relief from the competition of the inhabitants of other parishes afforded by the establishment of other schools by the plaintiffs."

In cross-examination on the above affidavit, Sir C. Reed stated, in substance, that the special advantages which would probably be conferred on the school would be the giving of prizes—the enabling some of the scholars to remain longer at school, and have the opportunity of advanced study—and the foundation of scholarships in connection with the school, to enable the children to go to middle-class schools.

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Hemming, Q.C., and Romer, for the plaintiffs: By the 23d section of the Elementary Education Act (33 & 34 Vict. c. 75) power is given to managers, under certain conditions, all of which have been complied with in this instance, to transfer to the School Board any particular school, together with its endowments. What is contemplated by the statute is, that the school and its endowments should be transferred by one operation as part of one arrangement. The School Boards are not bound to take transfers of schools, and in order to validate a transfer there \*must be the con- [578] sent of the managers, the School Board, the Educational Department, and the subscribers. Whenever the School Board accept a transfer, they do so on the terms of the arrangement proposed. In this instance the arrangement was that they should take over the burden of maintaining the school, and out of the endowment keep down, so far as it would go, the expenses of the school. The £90 a year was not sufficient before to keep down the expenses without voluntary subscriptions.

The character of the school has not been altered, except that its efficiency is probably increased. It is as much a local school as before, and more so, because under the School Board system more of the children at this school

come from the district.

Supposing even that the £90 goes into the general fund of the School Board, the parish is still a gainer; for whilst the efficiency is increased, that excess over the £90 which was formerly paid by the local subscribers is now thrown upon the general rates.

The Education Act says that where there is a deficiency of education the School Board must supply it; but it does not say that the School Board is bound to take over the burdens of an existing school without its emoluments, or,

indeed, to take over any school whatever.

The question turns wholly upon the language of the 4th clause of the scheme, behind which the court will not go. The original objects of this charity may have been doles for the relief of the poor; but the Court of Chancery, in the exercise of its plenary jurisdiction, has altered that, and by its scheme declared that this endowment shall be devoted to education. With the suggestion, then, that by the new arrangement the poor of the parish will not be benefited, it is really not within the province of the court to deal upon this application.

Sir H. Jackson, Q.C., and Maidlow, for the defendants: The issue raised is of importance, because this is the first

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endowment which is known to us to have been handed over to the School Board.

The School Board are not entitled to this endowment. We agree that the court cannot go behind the scheme, and for that very reason the court has no jurisdiction in this 579] proceeding, and \*in the absence of the Attorney-General, to try whether the proposed destination of the £90 is proper or not. But we say that the plaintiffs, although they are assignees by deed from our cestuis que trust, cannot compel us to make a transfer of this property to them.

According to the terms of the transfer the managers purport to assign only "so far as they lawfully can;" hence all question of surprise upon the School Board, or of misunderstanding, is out of the case. The School Board must be considered to have taken over the school, in the discharge of their public duty, irrespective of gain, and subject to all the liabilities attending the transfer. If they do not get this endowment, they cannot be heard to say that the consideration for which they took over the school has failed.

This endowment is not in itself alienable property; before the statute the managers could not have alienated it to any similarly constituted school. Then is this such an endowment within the 23d section as the school managers are enabled to transfer against the will of the trustees, if they consider, as they do, that the purposes of the transfer are alien to the trust?

The scheme directs payment to be made to a particular school, on the ground that that school was a benefit to the poor of the neighborhood. The court may possibly to-morrow be asked to sanction, and may sanction, another scheme. That shows that this mere direction that the managers shall have £90 a year paid to them is not property of such a kind as the managers can lawfully alienate.

Moreover, the school has become "materially altered." It has become a school under government inspection. From a school for boys it has been turned into a school for boys and girls. It is no longer connected with a particular society and with a particular religious, social, and political body.

The view put forward by the School Board has varied. At one time it was argued that the transferee who takes the onus ought also to have the benefit. That was found to be an argument in relief of the rates. Then it was put forward that the School Board will not have the benefit after all, because the £90 a year is to be applied to certain special

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purposes, for the benefit of the \*school. But that is [580] a resolution which the board may rescind at any time. They are under no terms, and there is no undertaking on the subject which they can be compelled to fulfil. The proposed annuity to the retired school-master is not within the purposes of the scheme, or of the charity on which the scheme was founded; and the special benefits proposed to be conferred on the school, whilst they are a departure from the terms and intent of the scheme, will be an inducement to the managers of other schools to transfer their property to the School Board.

Section 13 of the Elementary Education Act (1870) Amendment Act, 1873 (36 & 37 Vict. c. 86), which empowers school boards to accept gifts as trustees for educational purposes, provides that "nothing in this section shall enable a school board to be trustees for or accept any educational endowment, charity, or trust, the purposes of which are inconsistent with the principles on which the School Board are required by sect. 14 of the principal act, to conduct schools provided by them." Sect. 14 of the principal act provides that a board school is to be a "public elementary school." Sir Charles Reed's evidence goes to show that the board are about to devote this endowment to the purposes of middle class education. This is a "material alteration," and the court will not sanction the transfer to the plaintiffs of this endowment.

BACON, V.C.: This is said to be a case of very great im-For anything I know, it may be. I have not to measure that or consider that, because in the eye of the law one case is just as important as another, and I decline to enter into any of the speculations which have been suggested in the course of the argument, my duty being to decide according to the legal rights of the parties litigant before me, and I must say that I never in my life saw a case in which the legal rights were more clearly established by statute and by evidence than that which I have now to deal with. scheme is the law upon the subject—I cannot go behind the scheme. I cannot doubt that the scheme was right in itself, nor hesitate to say that all its provisions must by the law be recognized and carried into effect. The scheme is plainly this: There is a chargeable fund consisting of £90 a year, and the scheme directs \*that that shall be for the [58] expense of maintaining the Flint Street School, or any other school which shall be established in its stead; and the duty of the trustees is to pay that £90 a year to that school, or to the persons who have the management of that school.

the course of time it seems that there was some tangible property vested in the managers of the school, the school house and other things. Then comes the Elementary Edu-Now, before I mention that, before I part with cation Act. the position of the trustees, I ought to observe this—it is not necessary to read over again the words—the trustees' duty is to pay for the maintenance of the Walworth School, or any other school which shall be established in its stead, provided the provisions there stated are complied with. is a certain discretion vested in the trustees. The obligation may not in all cases be upon them to pay that £90 a year, for if the school shall be materially altered, or if any other circumstances should render it expedient—I am giving the largest construction to those words, "or other circumstances"—then the trustees in their discretion may apply that £90 a year for other similar educational purposes, and for no other purpose; no other purpose being

suggested.

Then comes the Elementary School Act, the provisions of which were referred to, which are very clear and distinct, and which apply directly to this case. It is found by the managers of the school that it would be expedient that the Walworth School should be transferred to the management of the Government Board, the Elementary School Board, and accordingly the very request mentioned in the 23d section is duly and punctually complied with. The convey-ance is made, and the managers assign and transfer, as far as they have any legal power to do so, the £90 a year for the purposes of that school. Then the act of Parliament, the clauses of which have been read—and I need not read them again—provides that when an arrangement is made under this section, the managers may, whether the legal interest in the school house or endowment is vested in them or in some other person as trustee for them or the school, convey to the parish all such interest in the school house and endowment as is vested in them or in such trustee, or in such similar interest as may be required. I cannot imagine words that could be suggested more clear and explicit, or more \*directly covering this particular case before me, for the £90 a year is vested in the trustees in trust for the school, payable by them to the managers of the school, and the managers have power to transfer that interest—that £90 a year which they are bound to receive—to the School The act of Parliament is literally in every respect complied with. It has been suggested in the course of the argument that it is possible there may be some misappliSchool Board for London v. Faulconer.

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cation by the existing School Board of this fund when they receive it, and Sir Charles Reed having been asked some questions in the box yesterday, in cross-examination upon his affidavit, said, that it was contemplated by the School Board to keep the £90 a year as a distinct fund, but, among other suggestions which were made, to apply it in giving prizes or encouragement to the pupils in the school. And Mr. Maidlow has argued thereupon that that is a clear proof which the court ought to adopt and take as a matter of fact, that it is the intention of the School Board to misapply this fund—to make it a school for middle class education, whereas, in point of fact, it is meant for elementary educa-I cannot attend to that argument in the slightest degree. If the £90 a year had been paid, without any School Board existing at all, to the managers of the school, who can doubt that it would be within their power and discretion, carrying on this school, to apply the £90, or such part of it as they thought fit, to any wholesome, lawful, proper purpose connected with the management of the school-it being always an elementary school, for that is a fact to which I cannot allow any contradiction—it is proved by witnesses over and over again—it is not only proved with a general assertion that it is an elementary school, but there is the scheme of education, the hours of attending, the fees paid for the attendants, and that is put in evidence perhaps needlessly, but there it is plainly in evidence, and this is, a school for purposes of education—exactly the same as that school which existed before the Elementary Education Act was passed? I have listened to the arguments, which have been extremely speculative and ingenious, but I cannot find any reason why the plain words of the act of Parliament should not be carried into effect—why that £90 a year which is to be paid to the Walworth School for the purposes of education should not be paid to the persons in whom \*the task of conducting that school is now reposed, instead of the individuals who formed the managing board. It was suggested that, as hereafter at some time there may be some misapplication of these funds by the School Board, liberty ought to be reserved in the decree I am now asked It is said that the trustees might to make for that purpose. come with some new scheme. No doubt they might, that is to say, they might have done so. They had upon this record not only abundant opportunity, but even an invitation, to show, if they could, any other purpose to which, in the exercise of their discretion, whatever that might be, they could apply any part of this fund. They have not sug1878

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gested it, and there is not a particle of evidence on their There is a general suggestion that there are charitable purposes mentioned in the 11th section of the scheme to which this fund might be applied. My answer to that is that they could not be so lawfully applied, but they can only be applied to institutions for educational purposes. There is no reason in the world to doubt that the provisions have been carried out in the manner prescribed by the general statute, the policy and expediency of which it is not for anybody to question; and being satisfied, as I am, by the law and the act of Parliament especially, that the managers who have the right to have this £90 a year are now the School Board, I cannot hesitate to make a declaration to that effect, and to order that the payment of this £90 a year be made to the plaintiffs, who by law are entitled to receive it.

There will be a declaration in the terms of the prayer. I am pleased and relieved by the statement that has been made to the court, that the costs are arranged.

Solicitors: Gedge, Kirby & Millett; John Clutton.

[8 Chancery Division, 584.] V.C.H., April 8, 1878.

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LEAVERS V. CLAYTON.

[1876 J. 34.]

Charitable Legacies—Direction to Executors to apply Residus to Charitable or Benevolent Purpose.

Testator, who died in October, 1875, after giving numerous charitable and pecuniary legacies, directed that his executors should apply to any charitable or benevo-lent purpose they might agree upon, and at any time, the residue of his personal property which by law might be applied to charitable purposes. The executors, in January, 1876, in writing, agreed that the residue should be paid to a charitable in-stitution to which the testator had given a legacy:

Held, that the direction to the executors was indefinite and inoperative; that the gift failed; and that the next of kin were entitled.

WILLIAM JARMAN, of Nottingham, who died on the 17th of October, 1875, by his will, dated the 23d of August, 1873, after appointing two executors—the plaintiffs—gave his moneys and securities for moneys, stocks, and furniture, and all his estates, both real and personal, not therein disposed of, unto them, their heirs, executors, &c., in trust to convert the same into money in such manner as they should think fit, to pay thereout his debts, funeral and testamentary expenses and legacies, and sums which he thereby bequeathed and gave to the persons and societies thereinafter named. The testator gave unto the treasurer for the time being of a society who called themselves the Governors of the General Hospital near Nottingham, £1,000 to be applied to the use of that charitable institution, and then gave to eight other charitable institutions or societies, described, and to eleven persons, named, legacies of various amounts, duty free, and said: "I direct that my executors shall apply to any charitable or benevolent purpose they may agree upon, and at any time, the residue of my personal property which by law may be applied to charitable purposes remaining after the payment of the legacies to charities named in my will, and after the payment of the legacies to friends named in my will, which not having been paid out of my personal property, and the proceeds of the sale of any real property which \*by law may not be applied to charitable purposes, [585] and which I direct shall be the primary fund for payment of any non-charitable legacies."

By a codicil dated the 11th of June, 1875, the testator gave an additional £1,000 to the Governors of the General Hospital near Nottingham, to be applied to the use of that charitable institution, and also gave other additional and further

legacies to the hospital and the persons named.

The testator was entitled to personal estate of considerable amount, comprising both pure and impure; and real estate which had realized the sum of £3,250.

The executors, pursuant to the direction in the will in that behalf contained, by a writing under their hands dated the 14th day of January, 1876, agreed and declared that the residue of the testator's personal property which by law might be applied to charitable purposes should be paid to the treasurer for the time being of the General Hospital near Nottingham, to be applied to the charitable purposes of that institution.

The defendant, as one of the next of kin of the testator, having claimed that the residuary personal estate so far as it consisted of impure personalty was undisposed of, and disputed the validity of the trust and direction in the will contained as to the residuary personal estate generally, and claimed that the whole of it, both pure and impure, was undisposed of, and ought to be divided amongst the next of kin, the executors brought this action to have the property administered, and the trusts carried into effect by and under the direction of the court, and for consequential relief.

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Robinson, Q.C., and Fellows, for the plaintiffs, stated the facts of the case.

Eddis, Q.C., and Freeling, for the Governors of the General Hospital: The next of kin will probably contend that this direction to the executors is void for uncertainty, but the answer to any such contention would be that the words are clear and positive: the executors shall apply the residue to any charitable or benevolent purpose that they may agree upon; and they have agreed to apply the whole to this 586] hospital, which is a charitable institution. The \*executors had power to apply the residue to the one or the other of the two purposes mentioned, and it is submitted that in a case where there are several purposes, and one of them is lawful and the other unlawful, the executors could properly apply the residue to the lawful purpose, and therefore the hospital is entitled to the fund after the payment of debts and legacy duty. This has been the law from the time of Lord Hardwicke downwards: Grimmett v. Grimmett('); Sorresby v. Hollins('); Lewis v. Allenby('); University of London v. Yarrow('); Wilkinson v. Barber(').

Cozens-Hardy, for the Nottingham Eye Dispensary.

Dickinson, Q.C., and V. R. Smith, for next of kin and the heir-at-law: There has been no disposition by the testator of the residue of his estate which the court can attend or give effect to. The only disposition of it is in the direction to the executors to apply it, and that is not an effectual gift. It is a direction to the executors to apply it as they may agree upon at any time to any charitable or benevolent purpose; and that is a trust not executed, but to all intents and purposes executory. The question is, has there been a gift of anything to any donee? It is submitted that there is great uncertainty as to what the executors were to do, and the cases which have been cited in reference to the direction being lawful or unlawful do not bear upon that The decisions in Morice v. Bishop of Durham (\*), Ellis v. Selby ('), Williams v. Kershaw ('), and James v. Allen (\*), show that this is not a good trust for charity, inasmuch as it cannot be stated how much there is for either purpose. The direction is not sufficiently certain or defined to enable the court to give effect to it. Is not this a trust which would authorize the executors to give a portion of the funds otherwise than to a charitable purpose? Can the

<sup>&</sup>lt;sup>1</sup>) Amb., 210.

<sup>(9) 9</sup> Mod., 221.

<sup>(8)</sup> Law Rep., 10 Eq., 668.

<sup>4) 1</sup> De G. & J., 72.

<sup>(5)</sup> Law Rep., 14 Eq., 96, 98.

<sup>(8) 10</sup> Ves., 536. (1) 7 Sim., 352; 1 My. & Cr., 286, 299. (8) 5 Cl. & F., 111.

<sup>(9) 3</sup> Mer., 17.

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court say now, after the decisions expressed in the cases referred to, that a benevolent purpose is not something otherwise than charitable? The court has to consider what the benevolent purpose is to be; \*that it cannot do. [587 The gift is to charitable and other purposes. The two cannot be separated, but must be taken as a whole, and as the court cannot determine what the purposes are to be, there is no disposition of the pure personal residuary estate, and therefore the next of kin are entitled.

Hastings, Q.C., and Hollis, and D. Jones, for other next

of kin in the same interest.

[The case of Kendall v. Granger (') was referred to.]

Eddis, in reply.

HALL, V.C.: Whether or not the distinction which has been contended for between the present case and Ellis v. Selby (\*) and the other cases referred to, particularly the case of Williams v. Kershaw ('), which was before Lord Cottenham, be a sound one, or even a satisfactory one, I do not mean to say; nor whether it might be better to adopt the view suggested by Mr. Eddis, that if there be one purpose which can be lawfully executed it should be done; but I am of opinion that I am bound by the decisions in Ellis v. Selby and the other cases cited, and that I must hold that in this case the direction has reference to a gift—a trust which the court cannot execute. It could not execute it at the date of the death of the testator, nor if the executors had not thought fit to exercise the discretion which was vested in them. The observations in the cases show that the test is this: that the court is not to wait and see whether the executors will appoint to charitable objects or not, but to look at the will as at the date of the death of the testator, and at once say whether the gift is definite or indefinite, and if the latter, that it is inoperative. That is the case here, and I hold that the gift of the residue fails, and that it belongs to the next of kin. The decree will be virtually the same as in Williams v. Kershaw.

Solicitors: Field & Co.; Taylor & Hales; F. & T. Smith & Sons; Field, Roscoe & Co., agents for R. Enfield, Nottingham.

(1) 5 Beav., 800.

(\*) 7 Sim., 352; 1 My. & Cr., 286, 299, (\*) 5 Cl. & F., 111.

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[8 Chancery Division, 588.]V.C.H., April 9, 1878.

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Vendor and Purchaser-Contract-Rescission Clause-Absence of Title in Vendor.

[1877 B. 875.]

A condition in a contract for sale that, if the purchaser shall make any objection or requisition which the vendor shall be unwilling on the ground of expense or otherwise to comply with, the vendor may annul the sale, does not enable a vendor to rescind the contract in a case where he fails to show any title whatever.

By an agreement in writing dated the 13th of February, 1877, the defendants agreed to sell and the plaintiff to purchase the inheritance in fee simple, free from incumbrances, of a piece of land at Camberwell for £155, whereof £10 was paid on the signing of the agreement, and the balance was to be paid on the 28th of February, which was the day fixed for the completion of the purchase. The agreement contained the following clause:—

"10. If the purchaser shall make any objection or requisition in respect of the title, or of any other matter or thing whatsoever which the vendors shall be unwilling on the ground of expense or otherwise to comply with, they shall be at liberty, notwithstanding any intermediate negotiation in respect of such requisition or objection, to annul the sale, and thereupon the said contract, and all matters and things therein contained, shall be at an end, and the purchaser shall receive back his deposit, but without any costs, interest, or compensation."

Requisitions were delivered on the 2d of March, and answered on the 5th of March. Early in the month of April the conveyance was prepared and engrossed, but before it was executed it was discovered that instead of having been seised in fee of the property at the date of the contract, the defendants were then only entitled thereto for the residue of a long term of years at a peppercorn rent, which expired on the 25th of March, 1877, shortly after which day the persons entitled to the reversion entered and took possession.

596] \*When the plaintiff ascertained that this was the case, he objected that the defendants could not make a title. Some fruitless negotiations ensued, and ultimately, on the 14th of July, 1877, the vendors gave the purchaser notice that they annulled the sale under the clause in the

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contract above set out, at the same time tendering him his

deposit, which he refused to accept.

The purchaser then brought this action against the vendors, and claimed specific performance of the agreement; or, in the alternative, for the return of the deposit, and

damages for breach of the agreement.

Hastings, Q.C., and Boome, for the plaintiff: A condition of this character does not enable a vendor to rescind in a case where he has failed to show any title whatever: Duddell v. Simpson ('); Dart's Vendors and Purchasers ('). The plaintiff has incurred expense in the investigation of the title and otherwise, and is entitled to damages from the defendants.

W. Pearson, Q.C., and Methold, for the defendants: The condition applies. The contract was well rescinded by the notice of the 14th of July, and all the purchaser is entitled to is the return of his deposit, which was duly tendered him; so this action ought to be dismissed with costs.

HALL, V.C.: It seems to me that the plaintiff is entitled to judgment for such damages as he may have been put to in respect of the non-performance of this contract by the defendants. It is said that the defendants in this case have availed themselves of the 18th condition of sale, and that they have thereunder put an end to the agreement, and that their having done so operates as a bar to this action. [His Lordship then referred to the facts of the case, and continued:]

The 10th condition itself does not appear to me to apply to the present case. It is this: "If the purchaser shall make any objection or requisition in respect of the title, or of any other matter or thing whatsoever which the vendors shall be unwilling on the \*ground of expense or oth- [590 erwise to comply with," then the vendors should be at lib-

erty to annul the sale.

I hold that such a condition does not apply to a case where the vendor has not any title at all. The words "unwilling on the ground of expense or otherwise to comply with" do not apply to a case where there has been an objection or requisition on the part of the purchaser in effect saying that the vendor has no title, and that the property belongs to some one else. The purchaser says in effect: "I do not make an objection or requisition in respect of anything which you may cure. I don't require you to remove the objection or requisition by purchasing the interest of the freeholder which you have contracted to sell and to

<sup>(1)</sup> Law Rep., 2 Ch., 102.

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which you have shown no title." Non constat that the freeholder would be willing to sell. The matter is not one capable of being complied with as between vendor and purchaser, and it is not, in my judgment, that which was within the contemplation of the parties when this clause was framed.

Further, it appears to me that even if it were such an objection as could be held to be within the clause, the course taken was not the right one. The matter went on so long after the time when the vendors' solicitors knew the real position of the case with reference to the title, without any steps being taken, that I hold they waived the right of rescission under this clause.

His Lordship then gave judgment for the plaintiff, directing an inquiry as to damages.

Solicitors for plaintiff: John Attenborough & Co.
Solicitors for defendants: Blachford, Riches, Kilsby & Wood.

[8 Chancery Division, 591.] V.C.H., May 9, 1878. \*LEWIS V. NOBBS.

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[1877 L. 214.]

Will—Direction to Trustees to invest—Russian Railway and Egyptian Bonds—Trust Securities passing by Delivery—Defalcation—Liability of Trustees—Next Friend a Defendant—Rules of Court, 1875, Order XVI, r. 8.

A testator by will gave all his residue to trustees upon trust to invest in the parliamentary stocks or funds, or upon real securities; and the will contained a proviso that as often as the trustees should think it expedient so to do, they might sell out, transfer, or otherwise vary any of the trust moneys, funds, and securities, and invest the same in or on any other funds or securities whatsoever:

Held, that the sale of New £3 per Cent. Annuities and the investment of the proceeds in Russian railway and Egyptian bonds was authorized, and not a breach of trust.

Each of two trustees retained possession of a moiety of bonds held in trust, and which passed by delivery, and one trustee committed a breach of trust:

Held, that the other trustee was liable to make good the loss sustained.

The name of a defendant, who was also the next friend of the plaintiffs, and whose wife was a defendant, was struck out, and liberty was given to the wife to defend separately.

THE plaintiffs were J. A. Lewis and his brother and sister, infants, by C. H. Gaunt, their stepfather and next friend; and the defendants were two trustees, and, by amendment, the said C. H. Gaunt and his wife (the plaintiffs' mother) and her eldest son.

A. C. Macnin, who died many years ago, by his will, made in October, 1838, after bequeathing certain legacies, gave all

the residue of his estate and effects to two trustees, named, their heirs, executors, &c., upon trust, to sell and convert into money and invest the same in the parliamentary stocks or funds, or upon real securities at interest, in their names. and upon trust to divide such trust funds, securities, and premises as therein mentioned. By a codicil made in 1839 the testator directed that the share of his daughter (the plaintiffs' mother) should be held by the trustees upon trust to pay the income to her for life for her sole and separate use, without power of anticipation, and after her death to

divide the share amongst her children equally.

The will contained the following clause: Provided always \*that it should be lawful for the trustees and the survivor of them, and the executors and administrators of such survivor, and their, his, or her assigns, and other the trustees or trustee, or only acting trustees or trustee for the time being of the will in whom or in whose names or name any stocks, funds, securities, or trust moneys "shall be vested from time to time and as often as they shall think it expedient so to do, to sell out, transfer, or otherwise vary or alter all or any of the said trust moneys, funds, and securities, and invest the same or any part thereof in or on any other funds or securities whatsoever, but so that the same trust moneys and premises when so varied or altered should be held upon and for the same trusts." The trustees originally appointed possessed themselves of the estate of the testator, and after satisfying all his debts divided the residue and invested the share of his daughter and her children in the purchase of the sum of £3,171 17s. 10d. New £3 per Cent. The daughter's husband (the plaintiffs' father) died in August, 1873, and she, in September, 1876, intermarried with C. H. Gaunt.

In October, 1874, the defendants Nobbs and Gresham were appointed new trustees, and the above mentioned sum of annuities was transferred into their names. On the 30th of October, 1874, they sold out the annuities, and invested the proceeds in the purchase of 2,600 Russian railway bonds. and forty Egyptian bonds, and they, at the request of his mother, the defendant Mrs. Gaunt, lent £250 to the defendant E. J. Lewis on his personal security. The trustees agreed that each should hold one half of the Russian railway bonds which were transferable by delivery. The defendant Thomas Gresham was a solicitor, and in November, 1876, he became insolvent, and afterwards absconded, and it was alleged that he had disposed of the bonds which were in his possession, and applied the proceeds to his own use.

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The defendant Nobbs placed the bonds which were left in his possession at his bankers, where they had ever since remained, and he had regularly paid the income to the defendant Mrs. Gaunt. The bonds had become reduced in value. It was charged that there was no power authorizing the trustees to invest the trust funds in such securities, and that what they had done was a breach of trust, and the plaintiffs claimed a declaration that the trustees were jointly and sev-593] erally liable to make good \*the whole of the trust funds, and that, if necessary, there might be administration by the court of the trusts; and costs. It appeared that the defendant Mrs. Gaunt had had pecuniary and business transactions with both the defendants, the trustees, and that she was still a debtor in regard to them.

Upon an objection being taken on behalf of the defendant Nobbs that C. H. Gaunt, who had been made a defendant, was not a proper next friend, the Vice-Chancellor, after being referred to Anonymous Case ('), Payne v. Little ('), and Rules of Court, 1875, Order xvi, rule 8, said that the proper course to pursue would be to strike out the name of C. H. Gaunt as a defendant, and give his wife liberty to de-

fend separately.

The name was accordingly struck out.

W. Pearson, Q.C., and C. C. Berkeley, for the plaintiffs: The investment in Russian railway bonds and Egyptian bonds was unauthorized and a breach of trust, and the trustees are jointly and severally liable to make good the same sum of annuities or the sum which they realized. the new investment was authorized, the trustees were not entitled to lend the £250 to any one on his promissory note or bill of exchange, that being merely an engagement to pay, and not a security, and the trustees are liable to make good A trustee is not justified in intrusting a co-trustee with possession of trust funds, and thus enabling him to dispose of them for his own benefit; therefore, as the defendant Nobbs left a moiety of the bonds in the hands of his co-trustee, instead of their being kept under the joint control of the trustees, he is liable for the defalcation which has been committed: Mendes v. Guedalla (\*). When the breach of trust was committed the bonds were of a higher value, and the plaintiffs are entitled to have that value realized or made good, so that they shall not suffer any loss: Stretton v. Ashmall (\*).

Dickinson, Q.C., and D. L. Alexander, for the defendant

<sup>(1) 11</sup> Jur., 258. (2) 13 Beav., 114.

<sup>(\*) 2</sup> J. & H., 259. (4) 8 Draw., 9.

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Nobbs: There was no fraudulent breach of trust on the part of this \*defendant. He has acted in good faith [594] and with reasonable caution, and with the approval and concurrence of the plaintiff's mother, the tenant for life of the trust funds. He believed that his co-trustee was an honorable man up to the time when he absconded, and he has at various times assisted the plaintiff's mother in her distress. The investment in the bonds was fully authorized, and therefore in that respect there was no breach of trust. to the son was upon the security of a policy of insurance on his life, and a charge upon his reversionary interest; and if that should be held to be not a good security, then the son should be ordered to pay the money into court at once; at any rate, there ought to be a declaration that as between him and the trustees he is primarily liable, and there ought to be an inquiry as to what interest has been and to whom paid, and the extra income derived by the mother from this loan ought to be applied in making good the principal which might not be paid by the son, the loan having been made at the request of the mother when she was discovert. The investment in the bonds being a proper one, the utmost the defendant Nobbs is answerable for are the bonds which he retained possession of, and those he will produce. He ought not to be held liable for any loss which may have resulted through the conduct of his co-trustee. Subject to the moiety of the bonds being restored, the defendant Nobbs will be entitled to his costs as between solicitor and client, and all expenses properly incurred as trustee.

C. C. Berkeley, appeared for the other defendants, except-

ing Thomas Gresham.

Hall, V.C.: I am of opinion that the trustees were authorized by the proviso in the will to invest the trust funds in the bonds; but though a proper investment, I think that the defendant Nobbs did not discharge his duty in allowing his co-trustee to retain possession of one half of the bonds, and the course pursued enabled the co-trustee to improperly deal with them. The duty of the trustees was to make an investment in the names of both, so that the bonds should not be transferable without the action of both, or, \*as [595 the bonds were transferable by delivery, care should have been taken that there could not be any improper disposition of them. The arrangement made by the defendant Nobbs being improper, he is liable for the illegal dealing with the moiety of the bonds of his co-trustee.

There must be a declaration of the defendant Nobbs' liability, and an inquiry as to when and how and under what

25 Eng. Rep.

circumstances the bonds were sold by Thomas Gresham, and what was the market value at the time, and what sum was realized, and what became of it; and if these facts cannot be ascertained, or what were the proceeds which came to the hands of Gresham, then the liability will extend to the value of the bonds at the time when they were placed in Gresham's hands in October, 1874.

As to the loan to the son, I think that the security taken by the trustees was not warranted. It was a breach of trust, and there must be a declaration that the trustees are jointly and severally liable to pay that money; and also a declara-tion that the son is also liable to pay it, and that, as between him and the trustees, he is primarily liable to do so; and I shall order that the money be paid within six months by either the son or the trustees.

Though the defendant Nobbs has committed a breach of trust, I consider that a personal imputation ought not to have been made against him. That was not necessary to the plaintiffs' case; therefore as regards him I shall make no order as to costs, he will have neither to pay nor receive any, but there must be an order for the payment of costs against the defendant Thomas Gresham.

Solicitors: Comyns R. Berkeley; Lewis & Sons.

See 22 Eng. Rep., 300 note; 23 Eng.

Rep., 165 note.

The authority given an administrator to sell lands to pay debts is a personal trust, which he has no authority to delegate to another. He may employ an auctioneer to make the sale, but he must be present and direct, superintend and control the sale: Kellogg v. Wilson, 89 Ills., 357.

Where a sale is made under a deed of trust, it is the duty of the trustee to be present for the purpose of observing its progress, protecting the interests of the parties concerned, rejecting fraudulent bids, and, if necessary, adjourning the sale. It is not sufficient that he is present at its opening and close, if he absents himself during its progress: Brickenkamp v. Rees, 69 Mo., 426.

In managing trust property, trustees must use as much care as prudent men ordinarily adopt in their own businessmore cannot be required of them: Carpenter v. Carpenter, 12 R. I., 544; Lingle v. Cook, 32 Gratt. (Va.), 262.

For a case where administrators were held justifiable in selling and accepting Confederate treasury notes in payment, see Lingle v. Cook, 32 Gratt. (Va.), 262.

A guardian, who was appointed at his own request, was held personally responsible for the loss of his ward's legacies, where such loss was directly attributable to his want of business judgment, if not culpable negligence: Stolhoff v. Reed, 32 N. J. Eq., 213.

So, for taking a second mortgage: Gilmore v. Tuttle, 32 N. J. Eq., 611 and note.

A guardian is not responsible for the loss of funds occurring by reason of his depositing them for safe keeping in a bank, except when it was known that such bank was unsafe: Minor's Estate, 1 Myrick (Prob.) R., 230.

A testator directed his executors, within two years after his death, to invest the sum of \$5,000 "in such stocks or other productive property as they may deem advisable, in their names as executors," for the benefit of Lewis v. Nobbs.

his grandson, the trust fund to be paid over to the grandson when twenty-five years of age.

The executors within the time limited opened an account in their books, in which they charged themselves as trustees, and credited the grandson with \$5,000. They invested the sum in three United States 7-30 coupon bonds, and two coupon bonds of the State of Rhode Island. These bonds they put into an envelope, labelled "Investment of five thousand dollars for" the grandson, with the date of the purchase, put this envelope into a tin box, and put the tin box into the vault of a bank in Providence. Held, that by these acts of the executors the trust of the grandson was properly and levelly constituted

legally constituted.

The bank vault was robbed and the bonds lost. Subsequently the executors, by giving indemnity, obtained through an agent, whom they had reason to believe honest, the issue of new United States bonds in place of those stolen. The agent appropriated the bonds, and but a portion of their value could be recovered. Held, that the executors or trustees were not liable for the loss caused either by the robbery of the vault or by the theft of the agent.

The trustees deposited in a savings bank the money recovered from the agent. Held, that this investment complied with the directions of the will: Carpenter v. Carpenter, 12 R. I., 544.

An administrator is liable for any funds of the estate loaned to any one for any other purpose than as a security: Estate of Lacoste, 1 Myrick (Prob.) R., 67.

If a guardian loan trust funds imprudently, and without security, he must make good the loss: Minor's Estate, 1 Myrick (Prob.) R., 230.

In investing funds, a trustee is held to perfect good faith, and the exercise of such reasonable care in the execution of his trust, as would be given by a prudent man in his business, and is re sponsible for any negligence creating loss, or for want of good faith producing injury, and will be held to repair and make good the loss or injury in case of failure to perform the duties required of him according to this rule: Lyell v. Hammond, 2 Lea (Tenn.), 878.

Where an executor who was charged with the investment of a fund in land

to be held for the sole use and benefit of the testator's widow during her life, and at her death to be sold, and the proceeds to be distributed-one half as the widow might direct by will, and the other half to the heirs of the testator's sister-made a judicious and proper purchase of land, as he thought and intended, in execution of the will, but innocently and ignorantly took the title in the name of the widow absolutely, not knowing that the trusts expressed in the will should be recited in the deed; it was held that this did not amount to a conversion of the fund or a breach of trust, and that as the land had not been alienated or incumbered, the court would correct the deed so as to recite the trusts therein, and that this was all the cestui que trust could fairly ask: Lyell v. Hammond, 2 Lea (Tenn.), 378.

A co-trustee, acting for conformity merely, to enable another who takes upon himself the more responsible duties of an active trustee, to transmit or acquire title, or make collections, is not in general responsible for the estate thus coming to the hands of the active trustee. But a co-trustee seeking to escape liability on the ground that he acted merely for conformity, should raise that issue in his pleadings, and the burden would be on him of showing that the active trustee alone collected and controlled the fund: Gray 2. Reamer. 11 Bush (Kv.). 118.

v. Reamer, 11 Bush (Ky.), 113.

Where a deed of trust directs in plain terms in what particular securities funds coming into the hands of the trustees shall be invested, and how until so invested they shall be held, the court cannot by its judgment defeat the intentions of the creator of the trust, and the beneficiaries thereunder, by directing different investments.

Without the consent of those beneficially interested in the trust, investments directed to be made in first mortgage securities cannot be made through the judgment of the court, in those of an inferior lien.

For the purpose of securing such change in investment, the trustees do not represent the beneficiaries, and an action to this end cannot be prosecuted in their names, the beneficiaries not being parties defendant, and having no opportunity to be heard in relation to the propriety of granting such relief:

Lewis v. Nobbs.

V.C.H.

Clarke v. St. Louis, etc., 58 How. Pr., 21.

A married woman may acquiesce in an unauthorized investment of trust property given to her sole and separate use, so as to bar her right of action against her trustee therefor. She is not estopped however by such acquiescence from seeking a withdrawal of the fund from the unauthorized investment, and the placing of it as required by the trust: Sherman v. Parish, 53 N. Y. 483.

In Tennessee, the cases as to when

In Tennessee, the cases as to when the court will sanction an act already done, without direction of the court, are conflicting, the court saying (Mitchell v. Webb, 2 Lea, 152), "If the application be made in advance, the interest of the minor is alone looked to; whereas, if made after the mischief is done, it is the interest of the guardian which is at stake. The issue is completely changed; and, at any rate, the subsequent approval of the act of the guardian in breaking into the corpus of the ward's estate is one of the most delicate and responsible duties which devolves upon a court of chancery."

The liability of a surety on a new bond, executed by a guardian after a conversion of his ward's estate, is only prospective.

Where, on the execution of such new bond, the guardian, as such, has in fact no assests, such surety is not liable, though the guardian then and subsequently charge himself in his reports to the court as with assets on hand: Lorvy v. State. 64 Ind., 421.

Lorvy v. State, 64 Ind., 421.

Where a guardian's bond does not plainly express the intention that it shall have a retrospective operation, the sureties thereon are not liable for the value of the property of the ward which the guardian had sold and converted to his own use before the execution of the bond: State v. Shackleford, 56 Miss., 648.

The sureties on a guardian's bond conditioned that "he shall faithfully account with the court for the mangement of the property and estate of of the ward, and shall in all respects perform the duty of guardian," are not liable for the failure of the guardian to account for the value of property of the ward converted by the guardian to his own use before the ex-

ecution of the bond: State v. Shack-leford, 56 Miss., 648.

An appropriation of the amounts due on several successive official bonds, respectively indorsed on the bonds and signed by the sureties therein, is conclusive in the absence of fraud or mistake: Pickering v. Day, 2 Del. Chy., 333.

As to the application of payments made by the principal in such a case, see Pickering v. Day, 2 Del. Chy., 333, 366-8.

H. was appointed treasurer for the county of Queens, on the 15th of March, 1862, giving a bond in the sum of \$4,000 with sureties for the performance of the duties of his office. He continued to hold the office until the 15th of March, 1868. Having failed to account for and pay over certain moneys received by him as such treasurer, after the first year for which he was appointed to the office, an action was brought on the bond : Held that the office of county treasurer under the Revised Statutes (8d series), chap. 45, § 1, being an annual office, the bond made by H. and the other defendants as his sureties did not extend beyond the first year he held that office, and as there was nothing to show that there was any defalcation during that year, there must be judgment for the defendants: Att'y-General v. 1 Nova Scotia Dec., 485.

The sureties upon an official bond are not liable for a defalcation of their principal occurring during a term preceding that for which the bond was given; nor are they made liable because their principal had, during the term for which the bond was given, property out of which he might have provided funds to make good the defalcation: Bissell v. Saxton, 77 N. Y., 191.

Where a county treasurer, in a county

Where a county treasurer, in a county under township organization, who is also collector, receives taxes belonging to the county, he will be considered as holding the same as collector until he reports them to the county clerk, as required in sec. 290 of the Revenue Act; and until this is done his sureties on his bond as treasurer are not liable for the same, but his sureties as collector are liable.

In counties under township organization, there are distinct duties involved in the offices of county treasurer and county collector, though exercised by the same person, and his bond as collector secures the performance of duties not covered by his bond as treasurer, such as relate to state, corporation and other taxes not given to the county: People v. Hoover, 92 Ills., 575.

Where an officer, elected for a second term, has in his hands at the beginning of, and after he gives a bond for that term, public moneys which came into his hands during his first term, his failure thereafter to pay and account therefor is a breach of the condition of the bond, and the sureties are liable: Braid, etc., v. Fonda, 77 N. Y., 850.

That an administrator has charged himself in his inventory with an account against himself on the books of his intestate, is open to explanation; and whether this charge on the intestate's books, at the time of his death, represented a subsisting indebtedness of the administrator to him, is a question to be determined by the circumstances of the case: Matter of Camp's Extate 6 Mo Am Rep. 563

Estate, 6 Mo. App. Rep., 563. Under the Indiana statute (2 R. S., 1876, p. 500, § 19), whenever two or more persons are appointed executors or administrators of a decedent's estate, each should "execute a separate bond" conditioned that he will faithfully discharge his duties as such executor or administrator; and where two persons as administrators execute a single bond, jointly, with sureties, such bond must be construed as if each of the principal obligors therein had thereby executed a separate bond, in the same penalty, with the same sureties, and subject to the same conditions; and in such case, after the resignation of his trust by one of such administrators, the other may bring and maintain an action against him and his sureties upon such bond for breaches committed by him alone as upon his separate bond: State v. Wyant, 67 Ind., 25.

In a suit brought by an administrator de bonis non for the amount of a debt due to the deceased, for which the debtor has given his promissory note payable to the first administrator, the plaintiff cannot recover on the note without showing that it has come into his possession; neither can he recover on the original consideration. without showing that the note has not been paid

to the first administrator or some assignee, or surrendering the same for cancellation.

Where the first administrator has surrendered to the defendants, who were bankers, certificates of deposit which they had given to the deceased without receiving full payment, the administrator debonis non cannot maintain an action against them for the balance. The transaction is the same as if the first administrator had been paid in full and had re-deposited a part of the money. In that case the defendants would be liable to him and he would be liable over to the plaintiff, but there would be no liability as between the defendants and the plaintiff: Brooks v. Mastin, 69 Mo., 58.

A complaint against a party for failure to proceed to collect a note is fatally defective if it fails to allege that plaintiff was damaged by the failure: Perry v. Masser, 68 Mo., 477.

An out-of-town note or draft deposited with a bank for collection may be sent by mail to the bank on which it is drawn or made payable, provided that be the ordinary method of transacting such business. Such first mentioned bank is authorized to surrender the note given for collection, to the bank upon which it was drawn, on receiving its draft for the amount.

In an action against a bank for negligence, while acting as a collection agent, it is incumbent on the plaintiff to prove in what respect the defendant has been negligent. So long as the collecting agent has pursued the ordinary and reasonable methods of making the collection, it is free from fault. sufficient evidence of agency, considered. The effect of not presenting a note or check payable at the particular place where it is payable, discussed and ex-Payment made by check or note, when inoperative if such check or note be dishonored. Effect of failure of the bank pending the collection. Insolvency must be proved and will not be presumed: Indig v. National, etc., 59 How. Pr., 10, reversing S. C., 16 Hun, 200.

Where the plaintiff deposited with the defendant, for collection, a sight draft, which the defendant sent to its agent, a corresponding bank, for collection, and such correspondent, before the draft had been collected, but supposing

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that it had been, credited the amount thereof to the defendant, who thereupon gave credit therefor to the plaintiff, and the correspondent bank afterwards, having discovered its mistake, charged back the amount of the draft to the defendant, and the plaintiff, being notified of these facts, refused to back the draft or have the amount of it charged to his account, and the defendant thereupon accused its correspondent with delay in not returning

the draft, and stated that it would be compelled to look to it for payment of it, and afterwards rendered the plaintiff an account without charging the draft back to him, and continued for two years to render him accounts in the same way: Held, that there was an account stated in respect to the draft which precluded the defendant from denying its liability to the plaintiff therefor: Harley v. Eleventh Ward Bank, 7 Daly, 476.

## [8 Chancery Division, 596.] C.J.B., April 1, 1878.

596] \*In re Craycraft. Ex parte Browning.

Fi. fa.—Seizure without Sale—Subsequent Liquidation—Costs of Possession and of preparing for Sale—Payment by Trustee—Bankruptcy Act, 1869, s. 87.

A sheriff's officer seized the goods of a trader debtor under a f. fa. for more than £50, and advertised them for sale. Before the sale could take place the debtor filed a petition for liquidation, and the trustee obtained an injunction restraining the sale, and possession was then given up. Upon the application of the sheriff for his expenses:

Held, that the facts of there having been no sale, and the liquidation of the debtor, did not affect the right of the sheriff to be paid by the trustee the necessary expenses of possession and of preparing for sale.

## [8 Chancery Division, 601.] C.J.B., May 18, 1878.

6011 \*In re Blanshard. Ex parte Hattersley.

Liquidation—Order and Disposition—Three Years' System of Hire—Custom—Rankruptcy Act, 1869, s. 15, subs. 5.

Four months previously to his bankruptcy the debtor hired a piano from H. & Co. upon the following written terms: £15 a year for three years by equal monthly payments of 25s.; at the expiration of which term the piano became the absolute property of the hirer; but in case the instalments were not paid, or in the event of the death, bankruptcy, or insolvency of the hirer before the expiration of the term, H. & Co. were to be at liberty to determine the hiring and take possession of the instrument. There was no special mark or label on the piano to show that it was not the property of the debtor. Upon the bankruptcy, H. & Co. removed the piano from the debtor's premises. The trustee claimed the piano as being within the order and disposition of the debtor. There was evidence of a custom of letting pianos on such terms:

Held, that the custom was sufficiently established, and one which the ordinary creditors of a bankrupt must be reasonably presumed to have known, and accordingly that the agreement for hire was, on the principle of Ex parts Powell (1), valid, and did not come within the mischief contemplated by the Bankruptcy Act, 1869, s. 15, subs. 5.

This was an appeal from an order of the Sheffield County Court. T. N. Blanshard, the debtor, a beer-house keeper In re Blanshard. Ex parte Hattersley.

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carrying on business at Sheffield, took from the appellants, Messrs. W. Hattersley & Co., pianoforte dealers, Sheffield, a piano of the value of £45 on the system known as the "three years' system." The terms of this hiring were specified in an agreement dated the 21st of August, 1877 (which was stamped with a 6d. agreement stamp), and were as follows:—

"Received from Mr. William Hattersley a walnut piano on hire at £15 per year, payable by equal monthly instalments, the first payment to be made on the 21st day of August, 1877. And I the undersigned N. Blanshard undertake not to remove the said instrument from 61 West Street. without the previous consent in writing of the said William Hattersley, and also to keep the same in proper order and condition. And it is agreed that in case default is made in payment of the said instalments, or any of them, \*or [602 in the event of the said N. Blanshard dying or becoming bankrupt, or insolvent, or of any valid execution being issued against him, or his effects, or of his making an assignment of his effects, then the said William Hattersley shall be at liberty at once to determine and put an end to the said hiring, and to take possession of the said instrument, and that in case he does so during the currency of a month the said N. Blanshard shall pay to him a proportion out of the sum payable for such month.

(Signed) "N. Blanshard."

"Memorandum, that if the said N. Blanshard shall continue to pay the said sums regularly until the same shall amount to £45, the said William Hattersley will thereupon (in consideration of such payment) assign and relinquish all his right in the said instrument in favor of the said N. Blanshard, and the same shall thereupon become his, but until such payment in full, the said N. Blanshard shall have no property whatever in the said instrument, otherwise than as the hirer thereof only.

(Signed) "W. Hattersley."

There was also a card left with the instrument, upon which

was, "Purchase price £39 15s. Hiring price £45." The first instalment was paid. The piano had the maker's name, W. Hattersley & Co., upon it in the usual way, but otherwise there was no special label or mark affixed to show that it was not the property of the debtor.

On the 11th of December, 1877, the debtor filed his petition for liquidation, and on the 12th of December a receiver and manager of the debtor's estate was appointed.

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On the 17th of December Messrs. Hattersley removed the piano to their own warehouse, three instalments for hire being due to them at this time. The trustee claimed the piano on behalf of the creditors as being within the order and disposition of the debtor; Messrs. Hattersley, however, refused to deliver up possession, and upon the trustee's application, the judge of the Sheffield County Court, considering that the agreement for hire was in its terms an evasion of the bankruptcy law, directed Messrs. Hattersley to deliver up the instrument to the trustee. From this order Messrs. Hattersley appealed.

603] \*The question was whether the custom of hiring pianos on the "three years' system" was sufficiently established to prevent the operation of the order and disposition clause, Bankruptcy Act, 1869, s. 15, subs. 5. There was evidence from numerous pianoforte dealers and makers from different parts of the country to the effect that the "three years' system" was a custom well known to the mercantile world and the public generally. Since this order the trustee had disappeared, but the committee of inspection had instructed counsel to appear in support of the order of the county court judge.

Winslow, Q.C., and R. T. Reid, for the appellants: The evidence as to the custom of letting out pianos on the hire-purchase system is clear and uncontradicted, and proves that the custom is universally known and practised, and that it is one which the ordinary creditors of the debtor may be reasonably presumed to have known, Ex parte Powell ('); and the evidence of custom is stronger in the present case than it was there. When such a custom is sufficiently proved, reputed ownership is excluded: Ex parte Watkins ('); Ex parte Vaux ('); Ex parte Stooke ('). This is not a case of a man making a custom for himself, as in In re Hill ('), where the decision would have been against the trustee, had the custom been satisfactorily established.

The custom of hiring pianos on the terms of the agreement between the debtor and Messrs. Hattersley is quite usual, and is not denied, and is no evasion of the bankruptcy law; by its terms the latter have only a reasonable security as long as any instalments remain unpaid.

E. Cooper Willis, for the committee of inspection: I can-

<sup>(1) 1</sup> Ch. D., 501. (2) Law Rep., 8 Ch., 520; 6 Eng. R., 613. (3) Law Rep., 8 Ch., 520; 6 Eng. R., 613. (4) 20 W. R., 925. (5) 1 Ch. D., 503 n.

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not deny that there is strong evidence in support of the custom among the trade, but the agreement in its terms is unreasonable, and is merely an evasion of the bankruptcy law. Any provisos for increase of security in the event of the hirer's bankruptcy, or giving one creditor an undue preference over the \*other creditors, is bad: Ex parte [604] Mackay ('); Ex parte Williams ('). Suppose the debtor had paid all except the last instalment and then became bankrupt, according to this agreement Messrs. Hattersley would have been able to take possession of the piano as their absolute property, and the debtor's estate would lose the benefit of all the previous payments, and that cannot be equitable. Besides, according to the terms of the agreement, Hattersley & Co. might take possession on default in the payment of any instalment, and at the time of the bankruptcy three instalments were in arrear. They have, therefore, been sleeping on their rights, and if they allowed the debtor to retain possession during that time it was at their their own risk: Freshney v. Wells (\*); Spackman v. Miller (\*). There is no label on the piano to show that it belongs to the appellants. Under all these circumstances the appellants cannot now retain the piano; it must form part of the debtor's estate.

BACON, C.J.: The main question to be dealt with in this case is the alleged custom of hiring pianos upon this three years' system. Now, the existence of this custom is, in my opinion, proved conclusively, and indeed it can scarcely be said to be called in question at all by the respondents. being established, no other question arises. Whether Messrs. Hattersley's name, or any special label, was or was not on the piano seems to me unimportant, as is also the point as to whether Messrs. Hattersley have, by neglecting to take possession of the piano when default was first made in the payment of the instalments, forfeited their rights, because if the custom is valid, the agreement for hire is also valid, and the question of order and disposition cannot arise. Questions of order and disposition were in old times always questions for a jury, and in discharging in some sense the functions of a jury, I must say that the debtor kept the piano in his possession with the consent of Messrs. Hattersley, the true owners, but only upon the terms of that writ-It was suggested that this agreement is ten agreement. \*an evasion of the bankruptcy law, but if the custom is clearly established (as I think it is), then the agreement

<sup>(</sup>¹) Law Rep., 8 Ch., 648. (²) 7 Ch. D., 188; 23 Eng. R., 469. 25 Eng. Rep.

<sup>(\*) 26</sup> L. J. (Ex.), 129. (\*) 31 L. J. (C.P.), 309,

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is no evasion of the bankruptcy law, but a protection and security to the maker of the piano that the bankruptcy law shall not step in and deprive him of his right as against the general body of creditors. It has been argued that the provisions in the agreement giving the piano back to Messrs. Hattersley on the bankruptcy of the hirer, even though all the instalments but one may have been paid, are an evasion of the bankruptcy law, as giving an increased security and undue preference in the event of the bankruptcy of the hirer; but the answer to that is, that this stipulation for forfeiture is simply in the nature of a penalty, against which, on due cause being shown, relief might be obtained elsewhere.

The question then comes back to the existence of this custom, for there is nothing in the case which induces me to come to the conclusion that the custom is an unreasonable one. I think the custom is distinctly proved—as in Ex parte Powell. (')—to be one which the ordinary creditors of the bankrupt may be presumed to have known; the agreement, therefore, is valid, and not within the mischief intended to be provided against by the Bankruptcy Act, 1869, s. 15, subs. 5. The order of the court below must consequently be discharged. Costs out of the estate.

Solicitors: Layton & Jaques, agents for D. H. Porrett, Sheffield; Charles Butcher.

(1) 1 Ch. D., 501.

See 24 Eng. R., 857 note.

H. fraudulently purchased goods of the plaintiff. Before the fraud was discovered, certain creditors of H. attached the goods in his hands, and thereupon a settlement was made between them and H., under which the attachments were withdrawn and the goods delivered by the officer to the attaching creditors, the officer making no return of the writs. After this the plaintiff, discovering the fraud, made demand on H. for the goods, and not receiving them brought trespass and trover against the officer to recover their value, having first made demand upon him:

Held: That the neglect of the defendant to return the writs was a matter of which the plaintiff could not take advantage.

That the defendant was justified in delivering up the property to the creditors under the agreement of H. with them

That the plaintiff had no such possession as would enable him to maintain trespass.

That the defendant's neglect to deliver the goods on demand, when he had lawfully parted with the possession, was not a conversion.

That the case was not affected by the fact that the attaching creditors had given the defendant a bond of indemnity: Halsey v. Huse, 46 Conn., 389.

nity: Halsey v. Huse, 46 Conn., 389.

Where, after the goods had gone into the possession of the defendant, the plaintiff accepted from her a confession of judgment for the whole value thereof, and after the facts now alleged to show conversion of the property were known to him, he issued an execution for its enforcement and collected a part thereof; held, that plaintiff, by accepting the judgment and taking out and

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enforcing his execution, must be deemed to have made his election to treat the goods as the property of the defendant under a sale by himself, and he cannot afterwards change his ground to that of wrongful taking and conversion: Field v. Bland, 59 How., 85, Ct. Appeals.

Complainants put to election between two suits pending, one in this court and the other in the Circuit Court of the

United States for this district.

The latter court is not a foreign court. A party may be compelled to elect between a suit here and one in a foreign court.

One of several defendants may call for such election after he has answered.

That there are parties, both complainant and defendant, in this suit in this court, who were not parties in the suit in the federal court, will not prevent this court from requiring such election, where the object of both suits and the relief sought are, in the main, identical

Such election may, after answer, be enforced, by order, upon motion: Cent. R. R. v. New Jersey, etc., 32 N. J. Eq., 670, and note; 19 Am. L. Reg. (N.S.), 426, 480 note.

One who has performed labor and

furnished material in building a bulk-head upon the land of another, is not estopped from bringing an action to recover the value of the labor and material, by the fact that he had previously brought an action against the same party to recover an undivided one-half interest in the bulkhead and land on which it was built, on an oral contract providing for payment in that manner, it appearing that the action was erroneously brought, the parties having subsequently agreed to waive the oral agreement for that mode of payment. The second action, in such a case, is not within the rule that where a party has,

Daly, 28.

Upon a sale, an agreement was executed, which stated that the vendees had that day given their note to the vendors for certain machinery, and that they claimed no right or title or privilege of ownership thereto until

upon the same state of facts, two inconsistent remedies, and resorts to one

with a full knowledge of his right,

he is therefore cut off from resorting to the other: White v. Whiting, 8

the note was paid. They did not pay the note. Held, a conditional sale; that the title remained in the vendors; and was not affected by the taking of the note, and that a bona fide mortgage from the vendee of the machinery got no title as against the vendors: Knowlson v. Sprong, 10 N. Y. Weekly Dig., 81, probably to appear in 21 Hun.

S. purchased certain articles of A., under an agreement by which they were to remain the property of A. until fully paid for. They were directed and sent to S. before being fully paid for, and while in transit were attached as the goods of S. The attaching creditor testified that A.'s agent to sell such articles, in the place of S.'s residence, had told him the goods belonged to S. The agent denied making this statement. Held, that giving the information testified to by the attaching creditor did not fall within the scope of the agent's authority. Held, further, that such information, even if given by the agent, would not bind A. unless given under special authority from A. to the agent: Skelton v. Manchester, 12 R. I., 326.

Where a piano is sold conditionally upon the payment of a certain price, and the proof is that only a part of the purchase-money has been paid, the title remains in the seller, and the plaintiffs are not required to tender back the part paid before they can recover, the payments made going in mitigation of damages.

In case the piano is not a good merchantable article, but a defective instrument, the defendant may show that fact, and that as much as it was worth, in its defective condition, has been paid, and that the plaintiffs have not been damaged anything. In which event the plaintiffs cannot recover at all: Guilford v. McKinley, 61 Geo. 230

Geo., 230.

A boiler composed of distinct sections was placed by the owner of a machine shop inside of a brick casing built on the ground. The sections weighed four hundred pounds each, and rested on an iron plate which rested on the inside of the casing. On the top of the casing, but not fastened to it, were iron plates, which could be removed, and each section taken out, without disturbing the brick work. Water pipes and steam pipes were con-

In re Blanshard. Ex parte Hattersley. C.J.B.

nected with each section by holes cut through the casing, but could be detached therefrom. The boiler, in connection with the steam engine, shafting, etc., was adapted to the machine shop business, and was used in such business. Held, that the boiler was a part of the realty as between mort-

gagor and mortgagee. An agreement between the seller and buyer of a boiler, placed in a machine

shop, and so annexed to the realty as to become a part of it, that the boiler should remain the personal property of the seller until paid for, does not bind a subsequent mortgagee without notice: Southbridge, etc., v. Exeter Works, 127 Mass., 542.

Where machinery is sold for part cash, and for the balance a note is taken reserving the title in the vendor until it is paid, the vendor, if the note is not paid at maturity, may recover the machinery in replevin from the vendee, or a purchaser with notice, without offering to refund the cash. Where, by the written terms of sale of machinery, permission is given the vendee to put it upon land, but the title is retained in the vendor until the price is paid, such machinery, when put up, does not become part of the reality, nor pass to a purchaser of the land with notice of the rights of the vendor of the machinery, but such vendor may recover it from such purchaser in replevin: Duke v. Shackleford, 56 Miss., 552, explaining Ketchum v. Brennan, 53 Miss., 596.

Where a vendee obtains possession of a chattel with the intention, by the vendor, to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract and obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction. And the legal consequence is, and if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor. the sale of a chattel, to be paid for on delivery, if possession is delivered without the payment, and before the vendor claims the chattel it is sold by the vendee to an innocent purchaser

and paid for, the vendor cannot recover the chattel from the innocent

But if there has not been a contract of sale, but only a transfer of possession, to become a contract of sale when payment is made, the person in possession has no title to the chattel, and can therefore convey none to an innocent purchaser, and the owner may recover the chattel.

In this case, held, there was a contract of sale as well as delivery, and though the vendee failed to pay, the vendor could not recover the chattel from an innocent purchaser for value: Old Dom. Steamship Co. v. Burckhardt, 31 Grat., 664.

One who "consigns" goods to another, to be paid only as they are sold by him, has not such possession or right to immediate possession as will support an action of tort for the conversion of the goods: Hardy v. Monroe, 127 Mass., 64.

H. leased to G. a piano for a month, and from month to month stipulating that a weekly payment of \$10 should be made, and agreeing that when the weekly or other payments amounted to \$525, G. should have a bill of sale of the piano. The instrument, until \$525 had been paid, was to remain the property of H., and in case of default in any payment was to be surrendered in good order. This was in February, 1872. In 1874 H. assigned his right in the piano to W. G. paid but \$175 of the \$525, although the piano remained in his possession. It was attached March 17, 1875, as the property of G., and was replevied by W., March 27,

Held, that G. had no attachable interest in the piano.

Held, further, that the question whether H. and W., by allowing G. to remain in possession as ostensible owner of the piano, had estopped themselves from denying G.'s ownership as against G.'s creditors was a question of fact for the jury.

Held, further, that G. having bought the piano on condition, and having been allowed to assume the apparent ownership, the burden of proof was on W. to show, non-fulfilment of the conditions of sale: Goodell v. Fairbrother,

12 R. I., 233.

An absolute delivery of goods to a

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purchaser without payment of the price, or the performance of other conditions of the sale, where such delivery is not procured by fraud or contrivance, passes the title to the property: Chapman v. Lathrop, 6 Cow., 110, 16 Am. Dec. 433 436 note

Dec., 433, 436 note.

Where goods are sold to be paid for on delivery, if delivery is made without requiring payment, although with the condition attached that the delivery shall not be considered complete so as to pass the title until payment is made,

a bona fide purchaser from the vendee, without notice, obtains a good title discharged of the lien for the purchasemoney: Comer v. Cunningham, 77 N. Y., 391.

A written bill of sale of "23 casks of wine" imports a sale of the casks as well as of the wine unless the contrary expressly appears, and parol evidence is inadmissible to show that it was agreed at the time of the sale that the vendee should return the casks: Caulkins v. Hellman, 14 Hun, 830.

## [8 Chancery Division, 606.]

V.C.M., Dec. 10, 11, 12, 14, 17, 1877. C.A., March 30; April 1, 1878.

\*METZLER V. WOOD.

1606

[1876 M. 169.]

Trade-mark—Trade Designation—Title-page—Fraudulent Imitation.

The plaintiffs were the publishers of a work intituled "Hemy's Royal Modern Tutor for the Pianoforte," a revised edition of which had been brought out in 1867, and which was well known and had an extensive sale, but was not so registered as to secure copyright. In 1874 the defendant employed Hemy to revise an old work, initituled "Jousse's Royal Standard Pianoforte Tutor," which had formerly been in high repute, but had entirely fallen into disuse. This revised work the defendant brought out under the title, "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor," the word "Hemy's," both on the outside of the book and on the title-page, being printed in much larger and more conspicuous type than any other of the words:

Held, by Malins, V.C., and by the Court of Appeal, that the plaintiffs were entitled to an injunction restraining the defendant from offering his work for sale with its present form, title-page, and cover, or any other form, title-page, or cover, calculated to deceive persons into the belief that it was the plaintiffs work.

This was an action to restrain an alleged infringement of

the plaintiffs' copyright and trade-mark.

In 1865 the partnership of D'Almaine & Co. was dissolved, and the property of the firm, including the musical publications in which they had a copyright or were interested, was sold by public auction. Among these were "Hemy's Royal Modern Tutor for the Pianoforte" and "Jousse's Royal Standard Pianoforte Tutor." The former was bought by the plaintiffs; the plates and copyright of the latter were bought shortly after the sale by the defendant Bickerton, who, at the time when the action was commenced, carried on business as a music publisher under the style of "Wood & Co."

Hemy's work had been written by Hemy in 1853 for D'Almaine & Co., and was not registered so as to secure copyright. It went through several editions, and in 1867 was

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revised by Hemy for the plaintiffs, who had given 500 guineas for it at the sale. It had a very great circulation, and at the time of the action it bore on the cover "Six hun-607] dreth Edition." "Specially revised and \*enlarged by the author." It was deposed to that it was usual to style every fresh issue of 250 copies of a musical work an edition.

In 1874 the defendant employed Hemy to prepare a revised edition of Jousse's work, which was an old work published more than fifty years ago, and had once been in high repute, but latterly had become almost unknown. This revised edition was printed for the most part from the original plates with some additions and some few alterations, and was brought out in 1875 under the title of "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor," and the word "Hemy's" was printed, both on the title page and cover, in much larger letters, and was more conspicuous than any other part of the title.

After some correspondence the plaintiffs commenced this action, alleging that they had as well the sole and exclusive copyright of and in the plaintiffs' work as the sole and exclusive right (as well by way of copyright as of trade-mark) to the use of the title "Hemy's Royal Modern Tutor for the Pianoforte," and of the name of Mr. Hemy and of the word "Royal"; that the defendant had employed Hemy in editing the defendant's work for the purpose of obtaining a colorable excuse for the use of the name "Hemy" on the title-page and cover; that the defendant had by his acts infringed and would continue to infringe the copyright and trade-mark of the plaintiffs; that the effect of the acts of the defendant was to make his work similar as well in appearance as in substance to and easily to be mistaken for the plaintiffs' work, and that the defendant did this for the purpose of deceiving, and had deceived and would deceive purchasers into the belief that the defendant's work was the plaintiffs' work. The plaintiffs claimed damages, an account of profits, an injunction, and a delivery up of the plates from which the defendant's work was printed, and all copies of the work.

The two works were similar in size and form, but the cover of the plaintiffs' work was yellow, that of the defendant's grey.

The cause came on to be heard before Vice-Chancellor

Malins on the 10th of December, 1877.

Higgins, Q.C., Solomon, and Maddison, for the plaintiffs. 608] \*Glasse, Q.C., and Crossley, for the defendant.

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MALINS, V.C.: This case has entailed litigation of a very expensive nature, and has been protracted to a great length before me; but as it presents itself to my mind it is of a very simple nature. In 1875, Hemy's work having a very large sale, it occurred to the defendant that he might avail himself of Mr. Hemy's services, and that if he could get Mr. Hemy to revise his works for him he might compete in the market with the plaintiffs. If he had competed with them in a fair manner it would have been right, for competition in trade is not only allowable but laudable. If, therefore, he had confined himself to a proper use of Mr. Hemy's name, no question, I am sure, would have been raised by the plaintiffs. The case does not rest on the contents of the books, for it is admitted that as the statutory provisions as to registration were not complied with there is no case of copyright. But when the defendant came to print the cover, fair trading required that the exterior of the work should bear the name of Jousse as the prominent word, and that the name of Hemy as editor should be made subordinate. question is whether the cover of the book is not calculated to The cases rest on a simple principle enunciated by Lord Langdale in Croft v. Day (1), which is, "that no man has a right to sell his own goods as the goods of another." That is the principle on which I decide this case. As to the interior of the book, there is no case for the interference of the The question is, is the exterior intended to deceive or calculated to deceive? The plaintiffs' book was no doubt commonly spoken of as "Hemy's Pianoforte Tutor." people in speaking of or ordering a book do not commonly use the full title. Now, if the plaintiffs' work had been recommended to me, and I had gone into a shop and asked for "Hemy's Pianoforte Tutor," and been served with a copy of the defendant's work, I should have been perfectly satisfied, and should have believed that I had got the work which had been recommended to me. I therefore say that the cover of the defendant's book is calculated to deceive, and I am sorry to say that I cannot acquit Mr. Bickerton of an intention to deceive \*purchasers. There is some [609] an intention to deceive \*purchasers. evidence, though not very strong, that the public actually were deceived. One witness says, "I went into a shop in the Haymarket, kept by Mr. Butler, and I asked for 'Hemy's Pianoforte Tutor.'" Now, if the defendant's work had not been published, there cannot be any doubt that he would have had handed to him the plaintiffs' work, instead of which there was handed to him, apparently as a matter of

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course, a copy of the defendant's work; and the same thing took place at a shop in the Strand. Being myself of opinion that the title is calculated to deceive, and finding that eminent musicians are of the same opinion, I can come to no other conclusion than that such is the case. If Mr. Bickerton had been inclined to treat the matter in a fair way, the correspondence which took place before the suit gave him ample opportunity for so doing. The plaintiffs did not object to this using the name of Hemy, provided the work, as is usual in the case of new editions of standard works, was published under the name of the author only, adding the

name of the editor. It was urged that the plaintiffs had made false statements, which disentitled them to relief. One was that this was the 600th edition of the plaintiffs' work. Mr. Metzler, on his cross-examination, swore that it was the custom of the trade to call every fresh issue of 250 an edition, and that upwards of 190,000 copies had been sold. This is uncontradicted, and though I think such a custom a foolish one, I cannot say that a statement made in accordance with it is fraudu-Then, again, it was urged that this purports to be a 600th edition specially revised by Hemy, whereas he never revised the work since 1867. I do not think, however, that I am bound to read the words as the defendant contends. I read them as stating that this is a special revised and enlarged edition by Mr. Hemy, but I do not read them as necessarily meaning that this 600th edition, as distinguished

I am of opinion, therefore, that there must be an injunction to restrain the defendant from publishing, selling, or offering for sale the defendant's work in or with its present form, title-page, and cover, or any other form, title-page, or cover, calculated to deceive persons into the belief that it 610] is the plaintiffs' work in the \*pleadings mentioned. I should have ordered the defendant to pay the costs of the action, but as the expense has been considerably increased owing to the plaintiffs going into the questions of copyright and the internal structure of the defendant's work, on which questions he has failed, the defendant ought not to pay all the costs. In order, therefore, to escape the difficulty of ascertaining how much of the costs is attributable to the questions on which the plaintiff has failed, I order the defendant to pay one half of the plaintiffs' taxed costs.

The defendant appealed. The appeal was heard on the 30th of March and the 1st of April, 1878.

Glasse, Q.C., and Crossley, for the appellant: The defendant is at liberty to use the word "Royal." He is certainly allowed to use the name of Hemy, for it is only used in the way of a true and bona fide description: Singer Manufacturing Company v. Wilson ('); Cheavin v. Walker (').

Higgins, Q.C., Solomon, and Maddison, contrà, were not called on.

JAMES, L.J.: It appears to me that the order of the Vice-Chancellor must be affirmed. There is really no question of law in the case, no question of the right of a man to the use of his own name, or anything of the kind. No such question arises as whether Mr. Hemy had sold his name, like a man selling his shadow. The simple question is: Did the defendant dishonestly pass off his work as the work of the plaintiffs? That really is the sole issue, and the Vice-Chancellor has found in favor of the plaintiffs. to me impossible to doubt the correctness of his conclusion. There was a work known as "Hemy's Royal Modern Tutor for the Pianoforte," which was the property of the plaintiffs, as was known to the defendant. It was very popular, and had a large sale. The defendant had bought the copyright of a work, which, in its time, probably was a valuable work, but which was practically obsolete \*at the time [611] when the transaction took place. It was called "Jousse's Royal Standard Pianoforte Tutor," and inside it is called "D'Almaine's New and Revised Edition of Jousse's Royal Pianoforte Tutor." The defendant employed Mr. Hemy to revise and bring out a new edition of it. There was nothing to prevent Mr. Hemy from employing his talents in that way; but, having done so, instead of the defendant bringing out his work as "Jousse's Royal Standard Pianoforte Tutor; New Edition revised by Hemy," he brings it out with Hemy's name at the top, and in the largest type, even larger type than in the other, as "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor." There is evidence in the case besides the comparison of the two works; there is evidence of distinguished musical men to show that this was calculated to deceive the public, and that persons wanting to get the plaintiffs' work might have the defendant's given them without detecting the difference. I am bound to say that a comparison of the two things which is always of importance in these matters of trade-mark, shows that the defendant's title-page was calculated to deceive the public into the belief that they were buying the other pub-

<sup>(\*) 2</sup> Ch. D., 484; 16 Eng. R., 827. 25 ENG. REP. (\*) 5 Ch. D., 850; 22 Eng. R., 518.

lication—viz., "Hemy's Royal Modern Tutor for the Pianoforte." It was calculated to deceive; and I cannot conceive any reasonable theory to explain the defendant's taking an obsolete work, getting it revised by Mr. Hemy, and putting Hemy's name as the prominent and striking distinguishing mark of his work, except that he intended to do that which the name was calculated to do-viz., to mislead the public into believing that, when they were buying the defendant's work, they were buying the plaintiffs'. If it was so calculated to mislead the public, the case of the plaintiffs is made There is no difference in the law laid down in any of the cases. In the case of the Singer Company, the question was put whether the thing was calculated to deceive, and if so, whether the man was to be answerable for doing what he knew must be the result of his own actions; and therefore in that sense it is always a question of fraud. I am of opinion that here the fraud has been made out. The Vice-Chancellor's judgment must be affirmed, and the appeal must be dismissed with costs. As the Vice-Chancellor had the case before him, a part of the case failed, and he gave 612] only half \*the costs, thinking that was a fair mode of dealing with it. I do not see any reason for departing from that.

COTTON, L.J.: I see no reason for disturbing the Vice-Chancellor's judgment. The question is not whether the plaintiffs have an exclusive right to the use of Hemy's name in connection with musical publications intended for the instruction of persons learning the pianoforte, nor whether the plaintiffs have any exclusive right to the term "Royal" in any of these works. But it is simply this, has what the defendant has done been done by him in order to pass off his work as the work of the plaintiffs? Now, in my opinion, the use of the word "Hemy" in the way it has been used, coupled with the other circumstances of the case, properly leads to the conclusion at which the Vice Chancellor has The defendant's work is stated to be, and is, no doubt, in a great measure, a new edition of "Jousse's Royal Standard Pianoforte Tutor;" and if the defendant had published his work in a different way, he might have published a new edition of "Jousse's Royal Standard Pianoforte Tutor," even although he had got it revised by Hemy, and even although he had stated that fact both inside and outside the book. But what has he done? The plaintiffs' work having now, and I believe having previously had, Hemy's name on the outside of the book, what the defendant does is this—though his book is Jousse's, revised by Hemy, he

is not content with stating that; he puts the name "Hemy" prominently forward on the top of the page in the very largest type that is found in the whole of the book. Glasse said it was not a question of larger or smaller type; but in the well known Glenfield Starch Case (Wotherspoon v. Currie(')) great stress was laid on the fact that the word "Glenfield," by the size and character of the type, prominently caught the eye of any one who looked at the packets of the defendant. Any one learning that "Hemy's Pianoforte Tutor" was the best for beginners, and going into a. shop where he was shown the work published by the defendant, would naturally say, "Oh, this is no doubt it; this is Hemy's; I will take it." And, in my opinion, the Vice-Chancellor has arrived at a perfectly correct \*conclu- [613] sion, not only that the use of the word "Hemy" in the way it is put on the outside and in the title-page was calculated to mislead purchasers, but that it was intended to have that result, when we find that "Jousse's Tutor" had not been known for years. As far as I understand, no instance of its sale is known since the year 1858, when Hemy's book was brought out; and many distinguished musicians say that, as far as they knew, it was entirely a thing of the past. Then we find this defunct work started into life with the name of "Hemy" prominently put on the outside. was that done, but for the purpose of passing off the defendant's book as that of the plaintiffs?

THESIGER, L.J.: I am also of opinion that the learned Vice-Chancellor's order ought to be affirmed. There is no doubt that the plaintiffs in their original statement of claim to a certain extent misconceived their rights, but it is clear, when you look at the amended statement of claim, that in the main they rested their case upon a right which the Vice-Chancellor has held, and which this court also holds, that they possess. In the 9th paragraph of that statement of claim I find that the plaintiffs (after having set out the acts of which they allege the defendant to have been guilty) state that "the defendant has, in fact, done and still continues and threatens and intends, unless restrained by this honorable court, to continue to do the acts hereinbefore stated for the purpose of deceiving purchasers, and has by such acts deceived, and will, unless restrained by this honorable court, continue to deceive purchasers into the belief that the defendant's work is in fact the plaintiffs' work, and several persons being so deceived as aforesaid have purchased the defendant's work," and so on. Now, I am of

opinion that the plaintiff has made out the case alleged in that paragraph, for I am of opinion that the title-page which the defendant has thought proper to adopt is calculated to mislead the public into the belief that the work was Hemv's well known work, and I also am clearly of opinion that the title-page was adopted by the defendant with that intention. It seems to me that a statement of a few of the facts will show this to be the case. There are two works—the one Hemv's work, the other \*Jousse's work, and they were known under those names. The one, Hemy's work, was a modern work, a popular work in the market, and was first issued to the public in the year 1853 by D'Almaine, and was revised by Hemy in 1867. The other, a work, no doubt, of value and merit in its time, but which previously to the year 1867 had been out of the market, was known only by a few musicians, and apparently was not even known to musicians of such eminence as Sir Julius Benedict, Mr. Brinley Richards, and, I think, Professor Rimbault. Under these circumstances we find that the plaintiffs purchased Hemy's work, giving for it a very substantial sum, viz., the We find, on the other hand, that the defendsum of £500. ant, Mr. Bickerton, purchased at the sale a considerable number of old plates for the sum of £110, among which were the plates of "Jousse's Royal Standard Pianoforte Tutor." What happened next? He has an interview with Mr. Hemv. And I may say that I attach some importance to the mode in which the republication of this work of Jousse's came about. It is obvious to my mind that the defendant was minded, if he could, to make use of Hemy's name in order to get some pianoforte tutor into the market, because the conversation between him and Mr. Hemy commenced by suggestions on the part of Bickerton that he should publish in a new and revised form, not Hemy's work itself, but a sequel to the 100th edition, as it was called, of "Hemy's Royal Modern Pianoforte Tutor." Whether we have all the conversation which took place between Mr. Hemy and Mr. Bickerton is not very clear—I rather doubt whether we have; but obviously, whatever was the suggestion of Bickerton, it was one which Mr. Hemy considered was not a proper suggestion, and it was in consequence of that, that Mr. Hemy suggested there should be a new edition of Jousse's work. Now, I agree with the learned Vice-Chancellor in thinking that there is nothing in the work itself of which the plaintiffs had a right to complain. But there is a most clear and obvious ground of complaint on the part of the plaintiffs in the title-page which the defendant has C.A. In re Regent United Service Stores.

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thought proper to adopt. How was the work of Jousse known in the year 1867? It had been edited and revised prior to the year 1867; because we find in a catalogue, and at D'Almaine's sale, that this work was spoken of as "Jousse's Royal Standard Pianoforte Tutor, edited by Ford." \*Why, if the defendant intended to act fairly by the plaintiffs, should not this new edition of the work have been issued with a similar title-page. But, instead of that, we find a title-page such that everybody who went into a shop for the purpose of purchasing Hemy's work, having been told to purchase Hemy's, would, if this work were handed to him, be satisfied he had got the work he was sent to purchase. That is still more plain when we think of the class of persons who would be purchasers of this book, probably mothers of families, or governesses instructing young children, and who were told that Hemy's was the best work for the purpose of so instructing children. They would go to the shop and would be presented with a copy of the defendant's work; and I will undertake to say there is not one person, whether of musical talent or knowledge, or not, that would not, unless he had thoroughly gone into the question of Hemy's and Jousse's works, be satisfied when he was presented with a copy of the defendant's work that he was receiving that well known and popular work of Hemy's. Under these circumstances, it seems to me clear that the plaintiffs' ground of complaint is established, and at the same time equally clear, looking to the circumstances to which I have referred, that there has been an intention on the part of the defendant to mislead the public into the belief that when they purchased copies of his work they were purchasing copies of the plaintiffs' work.

Solicitors for plaintiffs: Chappell & Son. Solicitor for defendant: Joseph E. Turner.

[8 Chancery Division, 616.]
V.C.M., March 14: C.A., April 3, 1878.

\*In re REGENT UNITED SERVICE STORES. [616] Winding-up—Distress for Rent—Companies Act, 1862, s. 163.

A company entered into possession of leasehold property under an arrangement with the tenant, but without any arrangement with the landlord. The rent payable by the tenant being in arrear, the landlord put in a distress, and on the same day a petition for winding up the company was presented, on which a winding-up order was shortly afterwards made. The liquidator applied for an order under the Companies Act, 1862 s. 163, to restrain the landlord from selling the goods. The liqui-

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dator agreeing to allow the landlord to come in and prove for the rent, Malins, V.C.,

made an order allowing him to do so, and restraining him from selling:

Held, on appeal, that the landlord was not a creditor of the company; that the court had no jurisdiction to treat him as such; that sect. 163 does not apply where the person distraining is not a creditor of the company; and that the legal right of the landlord could not be interfered with.

> [8 Chancery Division, 621.] C.A., March 28; April 11, 1878.

6211 \*Ex parte Pottinger. In re STEWART.

Preferential Debts—Proof—Dividend—Voluntary Bonds or Covenants—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 12, 32, 41.

By virtue of sect. 82 of the Bankruptcy Act, 1869, the old rule in bankruptcy, that debts arising upon voluntary bonds or covenants of a bankrupt are to be postponed in the receipt of dividends to debts for valuable consideration, has been abolished. All debts, except those to which by sect. 82 priority is expressly given, are now entitled to receive dividends pari passu.

> [8 Chancery Division, 628.] C.A., April 12, 18, 1878.

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\*In re Dudson's Contract.

[1877 D. 206.]

Tenant in Tail-Disentailing Deed-Protector-Owner of Prior Estate-8 & 4 Will. 4, c. 74, ss. 22, 27, et seq.

In the 22d section of the Fines and Recoveries Act (8 & 4 Will. 4, c. 74), which points out the person who shall be protector of the settlement, the "owner of the prior estate" is the person who is entitled under the settlement to the beneficial enjoyment of the rents and profits.

In a will made before the passing of the act the testator, being entitled to the equity of redemption of a freehold estate, devised the same to trustees and their heirs to the use of them and their heirs during the life of A. (a married woman), in trust for A. for her separate use, with remainder to the use of B. in tail, with remainders over. In 1871, the legal estate being still outstanding, the first tenant in tail, with the consent of A. as protector, disentailed the estate:

Held (affirming the decision of Jessel, M.R.), that the entail was effectually barred, A., and not the trustees, being the proper protector of the settlement.

This was an appeal from an order made by the Master of the Rolls in chambers under the Vendor and Purchaser Act (37 & 38 Vict. c. 78), s. 9.

Jane McKnight, by her will, dated the 14th of October, 1803, devised a freehold house and premises at Carlisle to J. Henderson and J. Tallentire, and their heirs, to the use of them and their heirs during the life of her daughter Jane, afterwards Jane Cockburn, in trust for the said Jane Cockburn for her separate use, and after her death to the use of the first and other sons of Jane Cockburn successively in

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tail, with divers remainders over. The testatrix died soon after the date of the will.

At the date of the will and of the death of the testatrix the house and premises at Carlisle were subject to a mortgage in fee, \*and at the date of the deed next men- [629 tioned the legal estate was still outstanding in the mortgagee.

By an indenture dated the 19th of October, 1871, and made between J. T. Cockburn, the first tenant in tail under the will of Jane McKnight, of the first part, the said Jane Cockburn of the second part, and T. Wright of the third part, and duly enrolled under the Fines and Recoveries Act, the said J. T. Cockburn, with the consent of Jane Cockburn as protector of the settlement, barred the entail in the property, and conveyed it to the use of himself in fee simple.

J. T. Cockburn afterwards sold the property subject to the mortgage to C. Dudson, who contracted to sell it to E. Kinsella. The purchaser took the objection that Mrs. Cockburn was not the proper protector of the settlement, and consequently that the disentailing deed was not effectual to bar the remainders over. A petition was accordingly presented by the purchaser under the Vendor and Purchaser Act, which was heard before the Master of the Rolls in chambers. His Lordship overruled the objection and dismissed the petition. The purchaser appealed from this decision.

Cavanagh, for the appellant: The question turns upon the construction of the various sections of the Fines and Recoveries Act with relation to protectors. The principal section is the 22d, which enacts that the owner of the prior estate, if freehold, is to be the protector; the question is, therefore, who is the owner of such prior estate in the present case? It has been taken for granted by conveyancers that where there is a trustee and a cestui que trust of the prior estate, the cestui que trust is in all cases the "owner" under the statute. But there is no judicial authority for this; it only rests upon the opinion of Lord St. Leonards, in his treatise on the Real Property Statutes ('), which has been followed by other text-book writers.

It is clear that this could not have been the view of the framers of the act; for if the 22d section meant that where there is a trustee and cestui que trust, the cestui que trust should in all cases be the protector, it would have been unnecessary to provide by sect. 27 \*that a "bare trus-[630 tee" should be excluded. I contend that "the prior estate" means prior in limitation as well as prior in time; so that

if there is an estate given to A. and his heirs during the life of B., in trust for B. with remainder to C. for life with remainder in tail, in that case A. and B. have the first prior estate in point of time, but A. alone has the prior estate in point of limitation, and therefore he would be protector. The trustees here are not bare trustees, for they have duties to perform, and also a certain beneficial interest, inasmuch as they have power to indemnify themselves against loss, and could if necessary mortgage the estate for that purpose: Poad v. Watson (1). If the beneficial owner is in all cases to be held to be the protector, it would often lead to absurd consequences: for instance, if a testator gave the first freehold estate to trustees upon trust to provide for payment of his debts, all his creditors would have to give their consent as protectors to a disentailing deed. For the interpretation of the statute for which I contend, I rely on sects. 14, 15, 22, 27, 28, 33, 34, 36, 37, 39, 40, 47, and on Keer v. Brown (1), Lysaght v. Edwards (1), Taylor v. Taylor (1). The 24th section has no bearing on this case, because it applies only between a married woman and her husband, and not between a married woman and her trustees.

In the second place, I contend that if the present trustees should be held to be bare trustees within the 27th section, the 31st section makes them protectors, this settlement having been made before the passing of the act. They would have been the proper persons to make a tenant to the pracipe for suffering a common recovery. This was the ground relied on before the Master of the Rolls, but without success. It is contended on the other side that all the estates are equitable, and therefore the trustees have really no estate at all in the land, and that Mrs. Cockburn is the only person who has any estate prior to the estate tail which the courts either of law or equity could recognize. But the trustees cannot be so set aside.

[Joshua Williams, Q.C., referred to Nouaille v. Green-

wood(').]

In that case the tenant in tail was in possession; and, 631] moreover, \*the remainders were all trust estates of a like nature with the estate of the tenant in tail. The particular estate and the estate in remainder must be all one estate, or else the recovery was not well suffered: Jenning's Case (\*). In the present case the trustees and the remainder

<sup>(1) 25</sup> L. J. (Q.B.), 396. (2) Job., 138. (3) 2 Ch. D., 499, 506, 516; 17 Eng. (4) 3 Ch. D., 145. (5) T. & R., 26. (6) 10 Rep., 43 b. R., 594, 599, 609.

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in tail had all one estate. The equity of redemption is not a mere equitable estate. In the view of the courts of equity, it is the ownership of the land. The mortgagee has in such view only an interest of a personal nature in the land, and the mortgagor continues seised of the absolute estate, so that the equity of redemption remains subject to all the uses of the settlement, and may be limited in trust so as to vest an estate in the trustee: Casborne v. Scarfe('); Wykham v. Wykham('); Wood v. Wood('): Powell on Mortgages('); Cholmondeley v. Clinton('); Coape v. Arnold('); Boteler v. Allington('); Scully v. Scully('); Pawlett v. Attorney-General(').

There is another objection to the disentailing deed: the grantee to uses did not execute it, and although there is no evidence that he has disclaimed, yet he or his heirs may do so, in which case the deed might be defeated. If the grant had been a common law grant, the deed certainly would be defeated by such a disclaimer: Peacock v. Eastland ("); Sheppard's Touchstone ("). And it is doubtful whether the same doctrine would not apply to a conveyance under the

Statute of Uses: King v. Boys (").

JAMES, L.J.: There is no validity in that objection.

Joshua Williams, Q.C., and Mounsey Heysham, for the

vendor, were not called on.

JAMES, L.J.: In the year 1833 an act was passed for providing new machinery for disentailing estates in lieu of the cumbrous process of suffering a common recovery. The 22d section of this act provides \*that where there is [632] an estate for life subsisting prior to the estate tail, "the person who shall be the owner of the prior estate, or the first of such prior estates if more than one," shall be the protector of the settlement. The true construction of this clause of the act was a matter of great importance, and from the time of the passing of the act it has been the universal opinion and the universal practice of conveyancers that the "owner of the prior estate" meant the substantial owner of the estate, that is, the owner of the beneficial interest. construction has been settled, and family settlements and purchases been made on the faith of it, for a period of fortyfive years. And we have now been asked to introduce confusion into this state of things, and to say that what was

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(¹) 1 Atk., 603.

(²) 18 Ves., 395.

(³) 7 Besv., 183.

(¹) Vol. i, p. 108 n.

(²) 2 Jac. & W., 182.

(⁴) 4 D. M. & G., 574.

25 Eng. Rep.
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(12) Dyer, 283 b, pl. 31,

<sup>(1) 1</sup> Bro. C. C., 72. (2) 8 Ir. Eq., 494. (3) Hardr., 465. (10) Law Rep., 10 Eq., 17. (11) Page 125.

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understood by all lawyers to be settled was obviously wrong and contrary to the true construction of the act of Parlia-We have been addressed for several hours, and a minute examination of the sections of the act has been gone into, and cases from the earliest times cited to us, for the purpose of establishing the proposition that this construction of the clause has been wrong, and that it is to be construed as if the words had been "the estate which is prior in time and prior in limitation;" and this construction has been supported with almost mediæval and scholastic subtlety. In my opinion the contention is quite inadmissible. We are also asked to say that in a case where an equitable estate is limited to trustees for the sole and separate estate of a married woman during her life, with remainder to her first and other sons in tail, the lady is not the owner of the prior estate for life; and that if it had been under the old law she would not have been the proper person to concur in making a tenant to the practipe. It was the settled practice that in equitable recoveries the person who made the tenant to the præcipe was the person who had the real equitable owner-The case cited by Mr. Joshua Williams, Nouaille v. Greenwood ('), disposes of the whole question.

COTTON, L.J.: I am of the same opinion. It is remarkable that the point principally relied on was not argued before the Master of the Rolls. \*The real question is whether, in a case in which all the estates are equitable, a married woman entitled for life for her separate use is the owner of the prior estate within the meaning of the 22d section of the act. In my opinion she clearly is. It was suggested that the persons named as trustees must be considered They have nothing vested in them. If the as the owners. estate given to the trustees had been a legal estate, the remainders also being legal, a question might have arisen as to the effect of the 31st section. But how is it possible that, there being no legal estate in them and no beneficial interest, they can be in any sense owners of the prior estate? There may be more difficulty as to the effect of the 28th section, namely, whether when a bare trustee is excluded the office of protector is to go to the person who has the beneficial interest, or to some other person. On this point I express no opinion; it has no application to the present case. on the ground that upon the true construction of the 22d section this lady was the owner of the prior estate. I should be very reluctant to overthrow a construction which has been adopted by conveyancers upon the opinion of Lord St.

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Leonards expressed so long ago, and on which so many titles have been founded. But I do not decide upon the ground that the construction has been adopted by conveyances, but because, in my opinion, it is the true and reasonable construction of the statute.

It was suggested in argument that if an estate were given to trustees during the life of a person upon trust to pay the rents and profits to the settlor's creditors, followed by a remainder in tail, the effect of our decision would be that all the creditors would have to give their consent as protectors of the settlement. But in that case the trustee would be the owner of the prior estate; it is impossible by any stretch of language to say that the creditors would be the owners of the estate.

The second objection was founded on the enactment in sect. 31—that where in a settlement made, as in the present case, before the passing of this act, the person who would have been the proper person under the old law to make a tenant to the pracipe is a bare trustee, such person shall still be protector of the settlement; and it is said that, assuming these persons to be bare trustees, they would have been the proper persons to make a tenant to \*the pracipe. [634] But that is an entire mistake. Under the old law, where the estate tail was legal the person to create the tenant to the pracipe must have the legal estate, but where the estate tail was equitable, the person to create the tenant to the pracipe was the person entitled to the enjoyment of the rents and profits. In this case all the estates were equitable, and the lady being entitled to the beneficial enjoyment would have been the person to make a tenant to the pracipe, and not the trustee.

THESIGER, L.J.: I am of the same opinion. For forty-five years one uniform construction has been placed on the 22d section, and has been acted on by conveyancers. Therefore, before I could consent to overthrow this construction and adopt any other, I should require to be convinced that it was clearly opposed to the reasonable intention of the act. Far from that, the construction which for forty-five years has prevailed appears to me the most reasonable construction. The question depends almost entirely on the 22d section. The protector is to be the owner of the prior estate and the construction clause says that the word "estate" is to extend to an estate in equity as well as at law. Here we have entirely to do with estates in equity. The trustees are persons who have no interest; the beneficial ownership is in the daughter of the testator. In such circumstances, the

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words "the owner of the prior estate" can only be satisfied by holding that such owner is the beneficial owner entitled to actual enjoyment of the rents and profits. The only plausible doubt that was suggested arose out of the 28th section, but such doubt is not sufficient to override the clear words of the 22d section. The only other clause to which I shall refer is the 31st. I agree with Lord Justice Cotton that it does not apply to a case like the present, where the trustees are trustees of an equity of redemption, and are not entitled to any beneficial occupation.

Solicitors: Matthews & Greetham, agents for T. Johnson, Carlisle; Gray & Mounsey, agents for Mounsey & Co., Carlisle.

#### [8 Chancery Division, 635.]

C.A., April 17, 1878.

# 635] \*In re Ambrose Lake Tin and Copper Company. CLARKE'S CASE.

Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25-Issue of Shares.

A company was formed for working a mine in Cornwall, the purchase-money for which was to be paid in fully paid-up shares to be allotted to the vendor or his nominees. On the 18th of January the memorandum and articles and the contract with the vendor were sent down by post from London to be registered in Cornwall. On the following day the directors met in London, in the belief that all the documents had been registered, and the vendor nominated the allottees of his paid-up shares, and the directors resolved that they should be allotted accordingly. On the next day the managing director, finding that although the memorandum and articles had been registered the contract had not been registered, told the secretary not to issue certificates nor allow any dealings with the shares till it had been registered. The contract was registered on the 26th of January. No register of shareholders nor any books of the company were in existence till after the 26th, but before that day some of the paid-up shares had been transferred. No certificates were issued, nor was anything further done by the company with reference to the shares till after the 26th. The books were afterwards made up, treating the shares as allotted on the 19th, and registering the transfers as made on the days on which they bore date:

Held, that the shares were not to be considered as issued before the registration of the contract, and that they were to be treated as fully paid-up shares.

This was an appeal by Clarke from an order of the Vice-Warden of the Stannaries placing his name on the list of contributories of the Ambrose Lake Tin and Copper Company, Limited, for 164 shares.

By a contract in writing dated the 22d of December, 1871, W. Eaton agreed to sell the Ambrose Lake Mine to Joseph Taylor and John Hardey as trustees for an intended company, to be called the Ambrose Lake Tin and Copper Mining Company, Limited, for £24,000, to be paid in 6,000 fully

words "the owner of the prior estate" can only be satisfied paid-up shares of £2 each in the company, and 12,000 shares

with £1 apiece paid on them.

The intended company was registered on the 19th of January, 1872, with a nominal capital of £36,000, in 18,000 shares of £2 each, and its registered offices were in London. The mine for \*working which it was formed being in [636 Cornwall, it was necessary for the registration to be made in the Stannaries. The memorandum and articles of association and the above contract were sent down from London to Cornwall by post on the 18th of January. The memorandum and articles of association were registered accordingly on the 19th, but the Registrar declined to receive the contract on the ground that it was insufficiently stamped. The result was that the contract was not registered till the 26th of January.

On the 19th of January the directors met in London in the full belief that the articles and contract had been registered on the morning of that day, and at their meeting Eaton nominated the persons to whom the 6,000 fully paid-up shares and the 12,000 shares with £1 each paid up should A large number of fully paid-up shares and of shares on which £1 per share was paid were, by Eaton's direction, allotted to Taylor, and the rest were allotted to the other directors. A call of 1s. per share was at this meeting made on the partly called up shares. Taylor transferred to Clarke 100 of his shares, on which £1 was to be taken This transfer appeared, from the books of the company, to have been made on the 20th of January, 1872, and registered on the 25th of the same month. The other sixty-four shares were also derived from Taylor. fer, dated the 22d of January, from Clarke to another person of twenty of these 100 shares was also put in. books of the company upon their face showed the allotments to have been made on the 19th of January and the shares issued.

Eaton, who was the secretary of the company, deposed that on the 20th or 21st of January, 1872, a letter was received in London informing the directors that the contract had not been registered. That Taylor, as managing director, thereupon directed him not to issue certificates of the shares which had been allotted, nor to take or permit any other proceedings with reference to the company or its shares, until after the agreement had been registered, and that he obeyed such instructions. That no part of the call which had been made was payable till the 29th of January. That

letters of allotment were not sent out. That neither the register of shareholders nor the register of transfers was 637] made up by the \*deponent as secretary till the 3d of February, 1872, and that it was not till that day that the books were furnished to him. That no certificates were issued, nor was there any register of shares or transfers in existence till after the contract had been registered, and that no certificates for any of the shares were issued until the 21st of February, 1872, when the deponent sent them out in a letter containing a list of them, which letter and list he verified.

Taylor also deposed that no certificates had been issued

till February, 1872.

One pound per share was afterwards paid in cash on all the shares which had been allotted as shares with £1 per

share paid on them.

An order having been made for winding up the company, Clarke was placed on the list for the 164 shares. The books of the company were produced before the Vice-Warden without any rebutting evidence, but further evidence having been admitted on the hearing of the appeal, the facts above deposed to by Eaton appeared.

Waller, Q.C., and Bunting, for the appellant: Upon the facts now appearing in evidence it is clear that there was not anything that can be called an issue of shares until after the contract had been registered. The requisitions of the act (30 & 31 Vict. c. 131, s. 25) were therefore complied with:

Hartley's Case ('); Bush's Case (').

Marten, Q.C., and Northmore Lawrence, for the liquidator: The evidence comes in substance only to this, that no share certificates had been given out. The allottees became owners of the shares on allotment. The certificates were only evidence, and the not having them did not make the shares remain unissued. Transfers of shares were made before the registration of the contract, and have been registered. In Hartley's Case there was a regular cancellation and new allotment. Blyth's Case (\*) shows that the issue of certificates is not necessary to the issuing of shares. 638] \*In Bush's Case (\*) the certificates were dated after the registration of the contract: here they refer to the old date.

COCKBURN, L.C.J.: I must say I entertain no doubt upon the question before us, which turns upon what is the meaning of the term "issue" in the statute 30 & 31 Vict. c. 131, s. 25.

<sup>(1)</sup> Law Rep., 18 Eq., 542; 10 Ch., 157; (2) Law Rep., 9 Ch., 554. 11 Eng. R., 511. (3) 4 Ch. D., 140.

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The company was perfectly competent to allot shares, and The act of Parliament imposes no condidid allot shares. tion upon allotment such as it imposes on the issue of shares, and I think that, inasmuch as the term "issue" is used, it must be taken as meaning something distinct from allotment, and as importing that some subsequent act has been done whereby the title of the allottee becomes complete, either by the holder of the shares receiving some certificate, or being placed on the register of shareholders, or by some other step by which the title derived from the allotment may be made entire and complete. Now here, upon the facts of the case, it is plain that the allotment having been made under the belief that the agreement between the vendor and the company had been duly registered at the proper place of registration, which turned out afterwards to be a mistake, and that mistake having been discovered before anything more had been done than the allotment of the shares, the person who appears to have had competent authority to do what he did, or upon whose authority, at all events, the secretary of the company acted, suspended everything, and nothing further was done on the part of the company until after the agreement had been registered. I do not think it material to consider what may have been done by any allottee who, knowing of the allotment, considered that he was entitled to deal with these shares as his shares, although his title was not then complete. As regards the company, nothing whatever was done beyond that mere allotment of the shares. In my opinion that does not constitute the "issuing" of the shares, for which something more than the mere allotment is necessary. The enactment is probably a salutary one; it has, at all events, this beneficial operation, that it prevents a man who has taken shares from setting up in opposition to the claims of creditors that his shares, \*which, for anything that the public can [639] discover to the contrary, are shares to be paid upon, are in fact to be taken as paid up shares. But I cannot say that the mere allotment is what the act of Parliament contemplated, especially where the parties in making it have acted under a bona fide belief, which afterwards turned out to be mistaken, that a contract had been registered. I think, upon the whole, that although this case may not be immediately within the terms of Bush's Case (1), it is within the principle of it, and that it does not fall within the penalty imposed by the 25th section of the Companies Act, 1867.

<sup>(1)</sup> Law Rep., 9 Ch., 554.

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JAMES. L.J.: I am of the same opinion. It seems to me quite clear that up to the time and at the time when the agreement in question was registered with the proper officer in Cornwall, nothing had occurred by virtue of which the company could have said to the shareholder. You are bound to take shares from me," nor anything by virtue of which the shareholder could have said, "I have become a shareholder in your company." No minute had been recorded, no share list had been made up, no communication had taken place, except mere talk of an allotment at a meeting at which Mr. Taylor was, for this purpose, a mere clerk. There was no entry in the minutes of the directors, but a mere talk of an allotment which was to be made in pursuance of an agreement and under the belief that the agreement had been duly registered. pears to me quite clear that if the company had been wound up the day afterwards, or at any time before that agreement was registered, nobody could have said that these gentlemen were shareholders. Before anything is done by which their title is completed, or by which the evidence of their title as between them and the company is completed, the mistake is discovered. Then, instead of going through the form, for it would be a mere matter of form, of making a new allotment, the machinery which has been stopped is set in motion again, and the matter is completed. It appears to me that the effect of 30 & 31 Vict. c. 131, s. 25, would be to work a great injustice if we were not to decide that these gentlemen are entitled to hold their shares as paid-up shares, \*as they are, and as any creditor might have seen if he had gone and looked at the share register of the company.

COTTON, L.J.: I am of the same opinion. The question which we have to decide is, whether these shares are to be considered as having been issued before the 26th of January, that being the day on which the agreement was registered, which provided that they should be treated as paid up, some in full and some in part. What is relied on by the official liquidator? It is this. He says there was an allotment on the 19th of January of these shares originally to Mr. Taylor, who transferred them to Mr. Clarke, and he contends that in consequence of that allotment which was made on the 19th of January, Mr. Clarke ought to be considered as holding shares issued before the registration of the agreement. in fact there was an allotment upon that day, it was an allotment made under an entire mistake, that is to say, it was an allotment made under the supposition that the contract with Mr. Eaton had been duly registered, and that consequently the directors had power to allot shares and issue them as

fully paid up, and it was made for the purpose of giving effect to that contract. If in fact the shares had been issued on that day, and the shareholder, before the commencement of the winding up and within a reasonable time after the discovery of the mistake, had come and said that the shares had been so issued under a mistake, and not in accordance with the contract which it was intended to complete, then they would have been entitled, as was decided in Hartley's Case ('), to say, "Cancel that issue, take those shares off the register if they have been put there, and issue to us shares which you can now issue after the registration of the agreement in due performance of the agreement." That was not done, because an officer of the company, before the allotment had been in any way acted upon, said to the other officers of the company, "That allotment was intended to be of shares which could be lawfully issued as paid up, but which, if they are issued under the present state of circumstances, cannot be issued as paid up shares; you cannot act upon it. Do nothing further at \*present. Hold your hand." [641] Consequently, nothing was done in pursuance of that allotment until after the time had arrived when the company could lawfully and effectually issue paid-up shares, and then they were issued. Putting a fair construction upon what was done at the meeting, this was right. What there passed may be regarded as an authority to the officers of the company to issue paid-up shares when and if they could legally and lawfully issue them; and although it may be doubted whether Mr. Taylor, the managing director, had any power to interpose and stop the resolution, he had full power to say to the officers of the company, "That resolution under the existing circumstances cannot be acted upon. Do not act on it until the facts enable you to act on it." That is what he did in effect. Even if there had been a regular resolution to allot these shares, still, in my opinion, it would have been impossible to say that the shares were issued before the registration, when the resolution had been in no way acted upon and nothing done under it until the company was in a position to perform its contract and to issue the shares as fully paid up. But, in fact, what was this so-called allotment? As far as I can ascertain there was no resolution passed to allot. Nothing at all appears on the books, and I take what passed to have been simply this, that whereas under this agreement these shares were to be issued as fully paid up to Mr. Eaton, or his nominees, the names of certain persons were given at that meeting as his

(1) Law Rep., 10 Ch., 157; 11 Eng. R., 511.

nominees to whom the shares were to be issued. The names are given by him at the first meeting, and nothing further is done until the company is able to perform its contract by issuing the shares. To guard against any misunderstanding. I wish to state that neither I nor, as I believe, any members of the court decide this case upon the footing that the issue of certificates is essential for the purpose of showing that shares have been issued within the meaning of the 30 & 31 Vict. c. 131, s. 25. There are many cases, and Blyth's Case (') is an example, where although no certificates have been issued, yet the transaction is complete—the allottee has become complete master of the shares, and a mere failure to perform the formal act of issuing the certificates does not prevent the shares from being issued within the meaning of \*the section. In the present case the resolution was to issue paid-up shares, and nothing was done upon it before the company was in a position legally to issue such shares, and it would be wrong to hold that these shares were issued before registration of the contract.

THESIGER, L.J.: I am entirely of the same opinion. The only substantial question in the case is whether these shares were issued before or after the contract was registered under the 25th section of the Companies Act, 1867. Now, in dealing with that section, there is no magic to be attributed either to an allotment or to the issue of certificates, but in each case the court must look at all the circumstances of the case, and see whether practically and substantially there has been an issue of shares at a time when there was not a contract registered under the section to which I have re-

ferred.

Reliance has been placed on behalf of the respondents on Blyth's Case ('), but that case appears to me clearly distinguishable. There, in the first place, no contract was registered at any time, and the winding-up found the shares registered in the name of the person whom it was sought to make a contributory without there being anything to show to the public that they were paid up. Next we find that the shares there had not only been allotted, but had been entered on the register in the name of the allottee; and certificates, although they had not been in fact issued to the allottee, were in existence, and had been signed and sealed. In addition to that, there had been dealings with the shares, there had been transfers of the shares, and those transfers had been duly registered in the share register. Here, on the contrary, we start with the fact that the contract was

Taylor's Case.

1878

registered under the 25th section. It was registered within a week of the registration of the memorandum and articles of association, and was only not registered upon the same day in consequence of a mistake which was clearly proved by the affidavits which have been placed before us; and we find that although there was an allotment, that allotment was made under the bona fide belief that everything had been duly and properly carried out, and that the agreement, instructions to \*register which had been given, had [643] The only thing which can be relied been duly registered. on against these circumstances is that there had been some sort of notice to some of the allottees, and that in one case if not in two cases—there had been a transfer of shares. But, on the other hand, the transfer undoubtedly took place upon the faith that the agreement had been registered, and that no liability would attach to those who took the shares. except as regards some of them to the extent of one-half of the nominal amount of the shares; and although a transfer in fact took place, it was a transfer of shares which, contrary to the facts which existed in Blyth's Case ('), had never been registered in the name of the original allottee, and they were not registered in the name of the transferee until some time after the contract under the 25th section had been duly regis-That being so, it appears to me that Blyth's Case is entirely distinguishable, and that the present case comes within the principle of Bush's Case (\*).

Solicitors: Gregory, Rowcliffes & Rawle; A. D. Smith.

(1) 4 Ch. D., 140.

(2) Law Rep., 9 Ch., 554.

### [8 Chancery Division, 643.] C.A., April 17, 1878.

In re Ambrose Lake Tin and Copper Company.

TAYLOR'S CASE.

Rules of Court, 1875, Order LVIII, r. 15-Extension of Time to appeal.

A contributory, on the 29th of March, being twenty-one days from the pronouncing of a refusal to remove his name from the list, gave fourteen days' notice of appeal. On the lst of April, conceiving that he ought to have given only a four days' notice, he withdrew his notice of appeal, and on the following day gave a four days' notice of appeal. On the hearing of the appeal, the objection was taken that it was too late:

Held, that the time ought to be extended.

Fisher v. Owen.

C.A.

[8 Chancery Division, 645.]

V.C.B., March 14: C.A., April 30, 1878.

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\*FISHER V. OWEN.

[1877 F. 78.]

'Striking out Interrogatories-Rules of Court, 1875, Order XXXI, r. 5-Interrogatories tending to criminate—Scandal—Irrelevancy.

An action having been brought to set aside a deed of gift made by a lady a few days before her death, on the ground that the instructions for it were given while she was in a state of stupor produced by large doses of a narcotic drug, the plaintiff exhibited interrogatories, following out in detail the statements of the claim, with a view of showing that the defendant, who was the grantee in the deed of gift, had procured the drug for her and encouraged her to take it, in order to avail himself of the stupor which it produced to obtain the execution of the deed of gift. The defendant moved to strike out the interrogatories as scandalous, irrelevant, and not put bona fide for the purposes of the action:

Held, by Bacon, V.C., that the interrogatories inquired after matters amounting to

an indictable offence, and must therefore be disallowed.

Held, on appeal, that supposing the matter inquired after to be an indictable 848] \*offence, that was no reason for striking out an interrogatory, which, being relevant, was not scandalous; and that the remedy of the defendant was to decline to answer, on the ground that his answer might tend to criminate him.

A party may decline to answer under Rules of Court, 1875, Order xxxi, rule 8, though he might have applied to have the interrogatory struck out under rule 5, and has not done so. The doubt in Sanuders v. Jones (1) overruled.

The words "or on any other ground" in Order xxxi, rule 5, mean grounds ejusdem generis with those specified.

This was an action by executors to set aside a deed of gift which had been executed by their testatrix on the 11th of April, 1877, a week before her death. The case made by the plaintiffs was that the deed, if executed at all by the testatrix, was executed under undue influence of and pressure exerted by her niece and the medical attendant, and while she was in a state of bodily and mental weakness which prevented her from understanding it; and that any instructions she might have given were given while she was in a state of stupor produced by large doses of a narcotic drug, and unable to give any real instructions.

The statement of claim alleged that the testatrix was taken That her niece, who had great influence ill in March, 1877. over her, was then staying as a guest with her, and that none of her four daughters, nor any other relation, was with her. That on the testatrix being taken ill the niece sent to a distance for Dr. B., a medical man, who was not the regular medical attendant of the testatrix, and placed him in attendance on her, and that he remained so till her death. Dr. B. was an intimate friend of the niece. That on hearing

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of the illness of the testatrix, three of her daughters came to her house and stayed there till her death, and urged the niece and Dr. B. to call in a medical man in the neighborhood who had formerly attended the testatrix, but they would not do so. That the testatrix had by her when her daughters arrived a supply of a powerful narcotic drug called nepenthe, which, as the plaintiffs believed, was procured for her by the niece. That the testatrix was then constantly taking it, and was thereby kept for several days before the 11th of April in a state of almost \*unbroken [647] stupor, and her mind was so confused by it that she frequently did not know what was passing around her or what she was doing. That her daughters remonstrated with Dr. B., and begged him to remove it from her, or at least to take care that she had only small doses of it, but that he refused and neglected to do so. That on the 9th of April the niece and Dr. B. remained almost the whole afternoon in the testatrix's room, and endeavored to prevent her daughters from coming in. That the testatrix was then in a state of stupor caused by the drug, and was quite incapable of understanding business matters. That on the evening of the 9th of April the niece and Dr. B. went together to London, and remained there until the evening of the 10th of April, when the niece returned to the testatrix's house. That on the 11th of April the niece and Dr. B., who had that morning returned from London to the house of the testatrix, went to the testatrix's room and remained there for some time alone with the testatrix, who was then in a state of great bodily and mental weakness, so that her death was expected daily. That the testatrix died on the 18th, and some hours afterwards Dr. B. informed her daughters that about a week before she had executed the deed of gift in question, and that it and the policy of insurance thereby assigned were in the custody of his solicitors in London. That on the 9th of April the niece and Dr. B. had gone to Dr. B.'s solicitors in London, and given them instructions to prepare the deed, which they did, and sent it to Dr. B., and that he and the niece on the 11th procured the testatrix's signature to it. That it was an indenture made between the testatrix of the one part and the niece of the other part, whereby the testatrix assigned a policy for £3,000 on her own life to the niece in trust to receive the money, invest it, pay three life annuities, amounting together to £100 a year, and subject thereto retain the £3,000 for her own That the deed was attested by Dr. B., and that the testatrix had no independent advice about it, and had no

communication as to it with any one but the niece and Dr. B. That this policy was the whole of the disposable property of the testatrix. The statement of claim then alleged to the effect mentioned in the first paragraph of this report, and asked to have the deed set aside.

648] \*The niece, who was a defendant, delivered a statement of defence contradicting all the material statements of the case alleged against her.

The plaintiffs then delivered interrogatories for the examination of the niece, interrogating her in detail as to all the above statements.

The niece took out a summons to have the interrogatories struck out, on the ground that they were scandalous and irrelevant, and not put *bona fide* for the purposes of the action, and were bad in substance.

The summons was adjourned into court, and was heard before Vice-Chancellor Bacon on the 14th of March, 1878.

Oswald, for the defendant: The statement of claim contains what amounts to the criminal charge against the defendant of administering a noxious drug called nepenthe. These interrogatories, being merely the statement of claim turned into the form of interrogatories, are scandalous and irrelevant, and also an abuse of the practice of the court, and ought to be struck out under Rules of Court, 1875, Order XXXI, rule 5, without the defendant being put to make her objection to answering them by an affidavit stating the grounds of her objection under Order XXXI, rule 8: Atherley v. Harvey (').

[He was stopped.]

Sir H. Jackson, Q.C., and James Bryce, for the plaintiffs: These interrogatories, painful as they may be, have a material bearing upon the case alleged in the statement of claim and the relief thereby claimed, and must therefore be allowed. Nothing, however derogatory, that is material to the matter in dispute, and tends to a discovery of the point in question, will be considered as scandalous: Daniell's Chancery Practice (1); Christie v. Christie (1). If by answering these interrogatories the defendant would subject 649 herself to a criminal prosecution, that may be \*good ground for declining to answer them in manner pointed out by Order xxxi, rule 8, but not for striking them out under rule 5, which applies only to interrogatories which are oppressive and irrelevant, and not put bona fide for the purposes of the trial. If these interrogatories are scandalous,

<sup>(1) 2</sup> Q. B., 524; 21 Eng. R., 244. (\*) 5th ed., p. 290. (\*) Law Rep., 8 Ch., 499.

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so is the statement of claim; but the defendant has taken no such objection, and has put in her statement of defence.

BACON, V.C.: If I were to permit such interrogatories as these to be exhibited I should be invading the province of the criminal courts. It would be competent, if such interrogatories were allowed, to file a claim against a clerk who had embezzled money, and get an answer from him on his oath, and then take him to the Old Bailey and convict him on his own answer. That would be a most inconvenient result with regard to the practice of the court. Admitting, as I do, that everything relevant to the matter may be protected from the charge of scandal, I do not think that the rule applies to the case before me, because, reading the claim, it is plainly an indictment for a felony or misdemeanor. There is not one word in the interrogatories, in my opinion, which is not both scandalous and irrelevant; and the only thing that can be done in this case is to strike out the whole of the interrogatories, without prejudice to the right of the plaintiffs to exhibit proper interrogatories.

The plaintiffs appealed. The appeal was heard on the

30th of April.

*Ilbert*, for the appellants: Order xxxi, rule 8, enables a party interrogated to object to answer, on the ground that answering may criminate him, but that is no reason for expunging the interrogatory. Voysey v. Cox (before Mr. Justice Lindley in chambers, Jan. 1, 1876) shows how the objection ought to be taken. Moreover, nothing is alleged here which would expose the defendant to a criminal charge. Everything interrogated to is material to the plaintiffs' case, and it is impossible to say that the interrogatories are scandalous, irrelevant, or not put bona fide for the purposes of the action. \*Horton Smith, Q.C., and Oswald, contra: This [650]

is a matter in which the court will not interfere with the dis-

cretion of the court below.

[JESSEL, M.R.: I am not aware of any authority for taking interrogatories off the file because answering them may tend to criminate.]

Eade v. Jacobs (') is against allowing an appeal. [Cotton, L.J.: That was a case of oppressive interrogatories. Here the question is whether the judge has not exercised his discretion on a wrong ground.

Atherley v. Harvey (2) is in our favor.

[JESSEL, M.R.: The judge there thought that he was following the rule in equity.

<sup>(1) 26</sup> W. R., 159.

<sup>(2) 2</sup> Q. B. D., 524; 21 Eng. R., 244.

COTTON, L.J.: In some cases the Common Law Divisions have gone on the old common law rule, under which the court had a discretion whether interrogatories should be administered or not.

An indictable offence under 24 & 25 Vict. c. 100, s. 23, is charged by the bill. In Saunders v. Jones ('), Lord Justice Baggallay doubts whether a defendant can decline to answer an interrogatory on any ground which would justify strik-

ing it out.

JESSEL, M.R.: This is an appeal from an order of the Vice-Chancellor Bacon striking out the whole of a set of interrogatories as being objectionable under Order XXXI, rule 5, the ground of objection being, not that there was anything objectionable in the interrogatories themselves, but that the answering of them, if the defendant were compelled to answer, would tend to criminate the defendant. That is, as nearly as I can give it, the substance of the

judgment.

Now, as I understand the rule, it has no application to such a case as this, but applies only to a case where the interrogatory itself is objectionable. The present case, which is one of a painful nature, amounts to this, that the defendant took advantage of the state of stuper to which a lady 651] was reduced by habitual indulgence \*in narcotic drugs to obtain a deed of gift from her at a time when she did not understand what she was doing. That is the substance of the case. It is suggested that answering the interrogatories, all of which appear to me pertinent to the issue, may have a tendency to criminate the defendant, because it is possible that in one view of the case she and the medical attendant may be considered as having procured the drug, though at the request of the testatrix, for the purpose of producing the state of stupor of which they after-Whether or not that be so, it is not wards took advantage. for me now to express an opinion, because I will assume, in favor of the respondent's contention, that the answering some of these interrogatories would tend to criminate the defendant. That, however, was no reason why the defendant might not elect to answer them. I suppose that in the great majority of cases the defendants would desire to answer charges of this nature, and would answer with indignation, denying every allegation made against them, and therefore it by no means follows that the defendant will de-cline to answer the interrogatories. The option to decline to answer them is left open to the defendant by rule 8 of CA

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the same Order, which says, "Any objection to answering any interrogatory may be taken, and the ground thereof stated in the affidavit." Therefore, allowing the interrogatories to stand gives the defendant the option, first of all, of answering them by denial either more or less complete, or, secondly, of declining to answer, on the ground that the answer may tend to criminate the defendant. On the other hand, by striking them out you prevent the plaintiff putting the question. If the defendant were a witness in the box you could not prevent the plaintiff putting the question, though the defendant might decline to answer, and thereby probably subject himself or herself to some disadvantage before the tribunal, whether composed of judge or judge and jury; and I do not see what authority we have to prevent the plaintiff from availing himself of this mode of inquiry of the defendant without calling the defendant as a It does not appear to me that the ancient practice of the Court of Chancery on this head has been abolished or interfered with by the Judicature Act or by the Orders. we look at the terms of the Order xxxi, rule 5, we find that everything there \*mentioned is in substance what [652 might be called scandal or impertinence, well known terms in the old Court of Chancery, with some additional words intended to extend the application of the rule to what is in substance impertinence, though, perhaps, not technically so. It states that an interrogatory may be struck out on the ground that it is impertinent or scandalous, "or is not put bona fide for the purpose of the action, or that the matter inquired after is not sufficiently material at that stage of the action"—words pointing at cases where there is not technical impertinence, but substantial impertinence. the words "or on any other ground" must receive a reasonable interpretation. They cannot have been intended to give a judge jurisdiction to strike out an interrogatory whenever he thought fit, but must apply to grounds ejusdem It winds up, "and the judge, if satisfied that any interrogatory is objectionable may order it to be struck out"—that is, that the interrogatory itself is objection-As I said before, it is not, and it never was, an objection to an interrogatory that answering it may tend to criminate the defendant, because allowing an interrogatory leaves the defendant at liberty to decline answering it on that ground.

It appears to me, therefore, that the order of the judge below ought not to have been made on the ground on which it has been made, and that that ground being a question of

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principle, the decision is open to be reviewed. I have read through the interrogatories, and the great bulk of them appear to me to be quite free from objection, and such that, even on the principle stated by the learned Vice-Chancellor, there was no ground on which they could be ordered to be struck out. I am far from saying that where the great majority of interrogatories are open to objection the judge is not at liberty to order them all to be struck out, leaving the plaintiff to put in new ones free from objection. I think that in such a case he is not bound to go through them, and to see what small portions of them ought to remain, but may properly exercise his discretion by striking them all out, giving the plaintiff liberty to set the matter right. should only be done where the bulk of the interrogatories is objectionable, or where the objectionable interrogatories are so intermingled with the others that it is difficult to separate 653] them. It appears to me on this ground also \*that the order of the court below ought not to have been made. and that we ought now to discharge it with the costs both here and below.

Corron, L.J.: I am of the same opinion. I will first deal with the contention that we ought not to interfere with the exercise of the Vice-Chancellor's discretion. In the present case the Vice-Chancellor has not gone through the interrogatories, and said, "There is a large part of the interrogatories which I hold, on grounds upon which I can exercise my discretion, to be such as cannot properly be put, and therefore I say they ought to be taken off the file and fresh ones filed;" and we are not reviewing the discretion of the Vice-Chancellor in the sense in which the Court of Appeal in the case referred to declined to interfere with the exercise of the discretion of the court below. In my opinion the Vice-Chancellor has proceeded upon a wrong principle, and that being so, the discretion was one which he had no power to exercise, and we are bound to review his decision in order to lay down the principle on which the discretion is to be exercised. But I entirely concur in the view that we ought to discourage appeals from the exercise of the discretion of a judge where he has gone upon a right principle.

The application in the present case was to strike out the interrogatories on the ground that they were scandalous, irrelevant, and not put bona fide for the purposes of the action. The Vice-Chancellor has gone upon the general principle that, as answering the interrogatories might tend to criminate the defendant, the defendant has a right to have them struck out under Order xxxi, rule 5. The applicant

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clearly thought that he was bringing himself within some of the specified causes in that rule. Can it possibly be said that these interrogatories are scandalous or irrelevant, or not put bona fide for the purpose of the action? Certainly nothing can be scandalous which is relevant. These interrogatories are relevant, and are clearly put bona fide for the purpose of establishing the case which the plaintiff seeks to establish by his action. Was the Vice-Chancellor, then, justified in ordering them to be struck out under the last part of the 5th rule, "or on any other ground"? In my opinion he \*Many of these interrogatories do not tend [654] to criminate, and in my opinion the proper course for the defendant to take as to those which may tend to criminate was not to ask that they might be struck out, but to insist upon her privilege, if she chooses, when she comes to answer them, as is provided by Order xxxi, rule 8. Reliance was placed on the observations of Lord Justice Baggallay in Saunders v. Jones (1), but that was merely a doubt, not a decision; and if it is necessary for the Court of Appeal to lay that ghost, I may say that there is no foundation for the opinion that a person who has a ground for refusing to answer is precluded from availing himself of that ground because he has not applied to have the interrogatory struck out, his right to decline answering being expressly reserved to him by the 8th rule.

Then it is said there is an authority in favor of the order of the Vice-Chancellor. In my opinion the case of Atherley v. Harvey (1) is no authority in its favor, and even if it were, if we thought it was wrong it would be the duty of this court, not being bound by that decision (although perhaps the Vice-Chancellor would be), to lay down the correct principle. When, however, we come to look at the case of Atherley v. Harvey, it appears that the judges thought they were following the rule in equity in ordering the interrogatories to be struck out. In my opinion they erroneously applied a rule which did exist in equity, namely, that a bill of discovery in aid of an action for tort was demurrable. That rule has no application where an action is properly brought in a court which has power to enforce discovery by means of interrogatories. Here an action is commenced in the Chancery Division for the purpose of setting aside a deed of gift, and the statement of claim states facts most relevant for the purpose of setting that deed aside. That being so, the interrogatories are properly filed for the purpose of obtaining aid to the case from the defendant. If the defend-

<sup>(1) 7</sup> Ch. D., 485.

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ant thinks that answering will tend to criminate her, there is a well known way of taking that objection, not by having the interrogatories struck out, but by declining to answer, on the ground that they will tend to criminate her. Therefore, I am of opinion that the principle applied by the Vice-Chancellor is an erroneous one, and that his order must be 655] \*discharged with the consequences which the Master of the Rolls has stated.

THESIGER, L.J.: I am also of the same opinion. I think that there is nothing in the interrogatories which will justify

their being struck out under Order xxxi, rule 5.

In construing these rules it is necessary to see what was the practice in equity and at common law before the passing of the Judicature Act. The Master of the Rolls has pointed out what was the practice in equity, and has stated that if a party intended to rely upon his privilege he must do so upon oath in answer to the interrogatories. I think that the rule was the same at common law. It is true that while there have been many cases in which interrogatories tending to criminate have been allowed, there have also been some cases in which such interrogatories have been refused. think, however, the cases may be reconciled, and may be put upon a broad and intelligible basis, which will be equally applicable to the present as to the old practice. Where you have interrogatories which may tend to criminate, or tend to throw discredit upon the party interrogated, it is the duty of the court to see in the first place that those interrogatories are put bona fide for the purpose of assisting the case which is made by the party interrogating; and, secondly, that they are put for the purpose of supporting, not a mere fishing case, but a definite case which is alleged on the pleadings, and which is proposed to be supported in evidence by those by whom those pleadings are put forward. That, it seems to me, was the principle of the decisions at common law.

In Edmunds v. Greenwood (1) the court refused the interrogatories on the ground that they were put by Mr. Edmunds for the purpose of criminating the defendant, and

not bona fide for the purpose of assisting the case.

In Stern v. Sevastopulo (\*) the interrogatories were disallowed, because they were of a general fishing character, and were not in support of some definite case alleged by the party interrogating, and the Lord Chief Justice Erle, in 656] dealing with the question in \*his judgment, and referring to the cases which appeared to be somewhat conflict-

<sup>(1)</sup> Law Rep., 4 C, P., 70.

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ing upon the point, reconciled them in this way. "In each of the cases referred to a definite fact was to be inquired into which was material to the case or defence of the opposite party, and in each of them the court held that the interrogatories might be put, though the answers might tend to disclose the party's own case, or even expose him to the peril of an indictment, in which latter case he might protect himself by declining to answer." Therefore, although in that case the court held that the interrogatories ought not to be allowed, they at the same time entirely concurred with the view which had been expressed in the other cases, that where an interrogatory, although tending to criminate, is put for the purpose of establishing a definite fact upon which the party interrogating relies, then that party is entitled to have the oath of the person interrogated either in answering the interrogatory or in asserting his

privilege not to answer.

That point was dealt with even more clearly in the case of McFadzen v. Corporation of Liverpool (1). Mr. Baron Bramwell says: "The court has of course a discretion to say that it will not admit of irrelevant, offensive, or scandalous questions. But we ought not, I think, to allow a question to be shut out only because the opposing counsel says that it is a question which the interrogated party may, perchance, object to answer. In equity any question that is material may be put, and the objection to answer it must be made under the oath of the person objecting, not on the mere assertion of counsel." Here Baron Bramwell put the practice at common law as in accordance with the practice in equity. "Therefore, unless we can see clearly that the question is one that ought not to be put, we ought to allow it, and to leave the objection to be taken at the stage of answering." Then Baron Channell says: "I am of the same opinion. I think the principle suggested by my Brother Bramwell is the fair and right one, and is the principle which is to be gathered from the recent cases. It was not intended by the Legislature that the interrogating party should be shut out from putting any question that is really material to his case. If he goes beyond that, and the court sees \*that his [657 questions are put mala fide, or with a vexatious or improper purpose, it will not allow them. But if that is not the case, then the interrogated party should be bound to say upon his oath that he believes his answer will be evidence against him in such a way that he is protected from answering."

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That being the position of the practice both in equity and at common law prior to the passing of the Judicature Act, it appears to me that there is nothing in that act which alters the practice upon this particular point, because I agree with what has fallen from the other members of the court, namely, that it is impossible to say that interrogatories, although tending to criminate or tending to discredit the party interrogated, are scandalous if they are pertinent and material to the case which the interrogating party is setting up.

Then the only remaining question is, whether there are any objections in detail to these interrogatories. Notwithstanding what has been argued by Mr. Oswald, it appears to me that they are interrogatories which, according to his account, would have been allowed in equity, they are such as have been put at common law, and are proper interroga-They are directed to prove, first, that the person who made this deed of gift had been in the continuous practice of taking this drug so as to put herself in a state of stupor; secondly, that on a particular day, when the instructions for the deed of gift were supposed to have been given, she was in that state of stupor; and, thirdly, that when the deed was executed she was in that state. nothing in the interrogatories which affords any ground whatever for the objections which have been made, except, perhaps, that one relating to the conversations. But I think that it may be equally justified with the others. passed between the doctor and the person who was the beneficiary under this deed of gift upon the occasion of the lady being induced to execute the deed of gift, becomes a most material fact in the case, as proving the allegation in the statement of claim, namely, that the deed was obtained from her when she was in such a state as not to be conscious of what she was doing. There being no one present on that occasion but the persons charged with the conspiracy, it appears to me that an interrogatory calling upon them to state generally the conversation, \*which took place may be justified, although as a rule such an interrogatory is objectionable. I am of opinion that the order of the Vice-Chancellor should not have been made, and that this appeal should be allowed.

Solicitors: Phelps, Sidgwick & Biddle; Noon & Clarke.

Scully v. Lord Dundonald.

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[8 Chancery Division, 658.]

V.C.B., March 22; April 4; C.A., April 30, 1878.

#### Scully v. Lord Dundonald.

[1877 S. 184.]

Enforcing Compromise of Action-Fund set apart to abide Result of Action.

S. commenced an action in the Common Pleas Division against D., to recover a commission claimed for services in obtaining payment of a sum from a foreign government. This sum was being administered in the Chancery Division, and S. commenced an action in that Division to establish a lien on D.'s interest, and to prevent the fund from being paid away. In this action an order was made for a sum of £5,000 to be set apart in the joint names of the solicitors of the plaintiff and defendant to answer the plaintiff's claim, and all further proceedings were stayed until after the trial of the action in the Common Pleas Division, and general liberty to applicable the solicitors of the plaintiff and defendant to answer the plaintiff's claim, and all further proceedings were stayed until after the trial of the action in the Common Pleas Division, and general liberty to applicable to the plaintiff and all for the plaintiff and the plaintiff ply was given. Shortly after this the solicitors of the plaintiff and defendant, by the authority of their clients, came to a definite arrangement by letter as to the amount of the plaintiff's claim. The plaintiff then applied for directions that this amount might be paid to him out of the fund set apart:

Held, by Malins, V.C., that the court had no authority to make such an order, as it

would thereby be enforcing a compromise of an action in the Common Pleas Division, but held on appeal that the court had jurisdiction to make the order.

LORD DUNDONALD, having considerable claims against the Brazilian Government in respect of services rendered by his father, the late Lord Dundonald, employed Mr. Scully, who was resident at Rio, to come to an arrangement with the government on his behalf, and it was agreed that Mr. Scully should receive a commission of 121 per cent. out of the sum

recovered.

A sum of about £40,000 was ultimately received from the Brazilian Government, but Lord Dundonald disputed its having been in any degree recovered through Mr. Scully's exertions, and declined to pay any commission.

\*On the 13th of April, 1875, Scully commenced an [659]

action in the Court of Common Pleas against Lord Dundonald to recover £5,037, the amount claimed for commission. The sum paid by the Brazilian Government was administered in the Chancery Division in a suit of Cochrane v. Lord Dundonald, and in the early part of 1877 an order was made by Vice-Chancellor Malins for distribution of the fund. After some negotiation about setting apart a sum of £5,100 to meet the plaintiff's claim, the plaintiff on the 12th of April, 1877, issued a writ against Lord Dundonald, praying a declaration that the plaintiff was entitled to a charge to the extent of £5,100 upon certain moneys, amounting to £10,643 or thereabouts, standing in court to the credit of Cochrane v. Lord Dundonald, to which Lord Dundonald was entitled under an order in that cause, by way of security for £5,037, or other the amount which might be recovered by the plaintiff in the action in the Common Pleas, and to have such sum of £5,100 set apart, and an injunction to restrain Lord Dundonald from receiving or dealing with such moneys without first providing thereout or otherwise the £5,100.

An injunction was moved for, and on the 26th of April,

1877, the following order was made:-

"The defendant by his counsel undertaking within three days after the receipt by him of the fund mentioned in the said writ of summons, as being in court to the credit of the cause of Cochrane v. Earl of Dundonald, to pay into a London bank, to be agreed upon between the solicitors of the plaintiff and defendant, to the joint names of Charles Burt and Joseph Harris Stretton, the sum of £5,100 to abide and answer the plaintiff's claim for £5,037 in the said writ mentioned, such undertaking to be without prejudice to any question. This court doth order that all further proceedings in this action be stayed until after the trial of a certain action now pending in the Common Pleas Division of the court, wherein the above named plaintiff is plaintiff, and the above named defendant is defendant. And it is ordered that the costs of this motion be reserved until the trial of this ac-And all parties are at liberty to apply."

On the 18th of May, 1877, a sum of £5,100 was in pursu-660] ance of \*this order deposited in the London and Westminster Bank in the names of Burt and Stretton.

In December, 1877, interviews took place between Mr. Stretton, as solicitor of Lord Dundonald, and Mr. Burt, as solicitor of the plaintiff, with a view to a compromise, after which the following letters passed:—

Dec. 19. Stretton to Burt:—

"Understanding from you that you will recommend your client to compromise this action on receipt of £2,000 and costs as between solicitor and client, the latter to be agreed with me, I am prepared with a view to put an end to the litigation to recommend and now make such an offer, which I hope will be accepted."

Dec. 21. Burt to Stretton:

"I have your note of yesterday, upon which I will write to my client. His last instructions to me were not to compromise for less than £4,000. His views perhaps may be now changed. You do not say for how long your offer is open. I suggested to you that you must give me time to

write to Rio and get a reply, say two months. I suggested also that your offer had better be £2,500 to include costs, and as there has been a considerable expense in Rio by reason of the commission, I do not think you will lose much, if anything, by the alteration, whilst it would enable me to put the matter more effectually to the plaintiff."

Dec. 21. Stretton to Burt:—

"I am obliged by yours of this date. I would rather not vary my offer, except so far as to give you two months' time for acceptance, which I omitted inadvertently in my former letter."

Jan. 18, 1878. Burt to Stretton:—

"I have received from Mr. Scully a telegram authorizing me to accept £2,000 with all expenses, including £250 expenses at Rio. I have had our draft bill made out, and find that the items amount as nearly as possible to £350. I am therefore prepared to settle the action on payment of £2,600. The security for costs in court to be returned to us, and judgment in the action given for the above sum. Proceedings in chancery to be stayed."

\*Feb. 1, 1878. Stretton to Burt:— [661 "My client positively declines to go beyond my offer, which he construes as limited to £2,000 and your firm's costs."

Feb. 14, 1878. Burt to Stretton:—

"I have now received a letter from my client which enables me to close this matter. I therefore accept the offer contained in your letters to me of the 19th and 21st of December, 1877, and shall be prepared to meet you and go through and agree the costs whenever you are ready to do so."

After this several meetings took place about the bill of costs, which was substantially agreed to.

On the 20th of February, 1878, Mr. Stretton wrote to Mr. Burt as follows:—

"I have just had a communication from my client saying that he considered the negotiations for a compromise terminated by your letter of the 18th of January, to which I replied on my return from Ireland on the 1st of February. In the meantime considerable expense has been incurred on his part, owing, among other things, to Mr. Hunt having been brought over to this country. Under these circumstances I am unable to proceed further."

The plaintiff then gave notice of motion before Vice-Chan-25 Eng. Rep. 70

cellor Malins that Burt and Stretton might be at liberty. and that the defendant might be ordered to concur with the plaintiff in requesting them, out of the moneys deposited in their names under and subject to the directions of the order of the 26th of April, 1877, to pay to the plaintiff, or his solicitor on his behalf, the sum of £2,000 and the amount of the costs, as between solicitor and client, of the plaintiff in the action of Scully v. Lord Dundonald mentioned in the order, and of the present action, the plaintiff offering to concur in such request, and upon such payment being made, to request and authorize Burt and Stretton to pay over to the defendant the residue of the moneys, or that otherwise the order of the 26th of April, 1877, so far as it stayed proceedings in the action, might be discharged, and that the plaintiff might be at liberty to proceed in the action and to 662] amend the writ. The \*motion was heard before Vice-Chancellor Malins on the 22d of March and 4th of April. 1878.

J. Pearson, Q.C., and Beaumont, for the plaintiff, in support of the motion: The compromise we now seek to enforce was entered into by the solicitors on each side. was proposed by Lord Dundonald's solicitor and accepted by ours, and from the correspondence it is clear that Lord Dundonald was aware of the terms proposed. There is evidence of an agreement entered into by Lord Dundonald to pay Mr. Scully 121 per cent. upon the amount which should be obtained from the Brazilian Government, and the action by Mr. Scully for that sum, which would be about £5,000, was fairly compromised by the offer to pay £2,000 and costs. If the court is satisfied from the evidence and correspondence that Lord Dundonald sanctioned the course taken by his solicitor, then the compromise ought to be enforced, as your Lordship decided in Holt v. Jesse (1) and in Pryer v. That case was afterwards appealed and the de-Gribble (\*). cision reversed on the ground that the agreement for a compromise could not be enforced upon motion in a suit, but That, of course, was decided that a fresh bill must be filed. under the law as it stood before the Judicature Act, but now by the act of 1873 (36 & 37 Vict. c. 66, s. 24, subs. 7), the court has power to grant such remedies as the parties are entitled to without the institution of a fresh suit. was decided by Vice-Chancellor Hall in *Eden* v. *Naish* ('), in which his Lordship followed an unreported case of Hakes v. *Hodgkin*, decided by the Master of the Rolls.

<sup>(1) 3</sup> Ch. D., 177; 17 Eng. R., 828. (2) Law Rep., 10 Ch., 534; 14 Eng. R., 776. (3) 7 Ch. D., 781; 25 Eng. Rep., 9.

Higgins, Q.C., for the defendant: The answer to this application is, first, that there really never were any definite terms of compromise agreed upon. An offer was made by Lord Dundonald's solicitor to Mr. Scully's solicitor. The latter required some further concessions, and the matter was referred to the plaintiff to ascertain whether he was willing to accept the proposed terms. In the meantime, when Lord Dundonald \*was made fully aware of what his solicitor had proposed, he declined to accede to the arrangement. A client cannot be bound by a compromise effected by his solicitor, unless with his entire sanction, and there is Lord Dundonald's statement that he never did give his sanction.

Then as to the form of this application, the cases cited do not apply, because in those cases the actions in which the compromises were made were actually pending before the court, but here you are asked to enforce a compromise of an action in the Common Pleas. The order made by your Lordship in April, 1877, was that £5,000 should be deposited in the names of the solicitors, to abide the decision in the Common Pleas, and all further proceedings in this suit were stayed until the trial of the common law action. And in the cases cited the application was by the person who had to pay the money, and not by the person who was to receive it. On these grounds it is submitted that the court has no power to make the order asked.

MALINS, V.C.: It appears that by the order made by me in April, 1877, the sum of £5,000 was ordered to be deposited in the names of the solicitors, and that all further proceedings in this action should be stayed until after the trial of the action in the Common Pleas Division. The meaning of that I take to be until after the termination of the action. So that an action cannot be considered as tried until the trial has taken place, or that which the parties choose to substitute for the trial, viz., an agreement for compromise. But I think the true meaning of it is,—after the final ending of the action by judgment, or by compromise, or otherwise,

and then the parties are at liberty to apply.

Now, in this state of things, it appears that on the 19th of December, 1877, Mr. Stretton, of the firm of Newman, Hilliard & Stretton, writes to Mr. Burt, the plaintiff's solicitor, offering to compromise the suit on payment of £2,000, "with costs as between solicitor and client, the latter to be agreed with me." Further correspondence took place, in which some deviation from the terms was proposed by Mr. Burt, but it was arranged that two months should be allowed for a communication to be made with "the plaintiff. [664]

The two months would extend to the 21st of February in this year. Meanwhile a communication had taken place between Mr. Stretton and Lord Dundonald, and on the 1st of February Mr. Stretton writes, "My client, Lord Dundonald, positively declines to go beyond my offer, which he construes as limited to £2,000 and your firm's costs."

Now I do not think it satisfactory for any counsel, or any solicitor having been party to a compromise, to endeavor to set that compromise aside. I am satisfied of this, that Lord Dundonald had authorized a negotiation, and if a man gives a solicitor a general authority to enter upon negotiations for a compromise, unless he puts an express restriction upon the solicitor, that is an authority to the solicitor to conclude any compromise which he thinks fit; but I am satisfied also not only that Lord Dundonald authorized a general negotiation for a compromise, but that he perfectly well knew what had been agreed between Mr. Stretton and Mr. Burt—that the sum to be paid on that compromise was £2,000, with the plaintiff's costs.

Under these circumstances, I regret that Lord Dundonald should have repudiated the bargain that was deliberately entered into, and which ought to be binding upon him. It was a compromise fairly and honorably entered into by solicitors of great experience on each side, and when such arrangements are made the court can never look upon an attempt to repudiate them without the greatest disfavor.

But still, it being my opinion that this is a compromise which ought to be binding on Lord Dundonald, and I cannot express my opinion too decidedly that he ought to fulfil it, the question I have to decide is whether I can compel him to do so, and I am sorry to say that in this stage of the proceedings I am obliged to come to the conclusion, upon the form of the order, that I cannot, for this is a compromise of the action proceeding between Mr. Scully and Lord Dundonald, which was an action in the Court of Common Pleas. My order is that all proceedings in this cause shall stand over until after the trial, which I have already said means after the conclusion of all the proceedings in the action, and then there was liberty to apply. Many technical points have been raised against the validity of this compromise. 665] Amongst other things, it \*is said that a solicitor has no power to bind his client by a compromise. As a general rule, that is true; the solicitor in the absence of his client cannot bind him by a compromise. But a solicitor can bind him, and counsel can bind a client by a compromise when that is expressly sanctioned by the client

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himself. That point I decided in Holt v. Jesse (1), where I should have been obliged to come to the conclusion that the compromise entered into before me by the counsel and solicitors would not have been binding on Mr. Jesse but for the fact of Mr. Jesse also authorizing his counsel and solicitor to do the very thing which they did. Therefore I did not decide that the solicitor could not bind his client, but that what the party himself, his counsel and solicitor did, would bind him when they had his express authority in court at the time. I have said what the rule is, and as a rule I suppose it had better so remain, that without express authority the solicitor cannot bind his client. But in this case I am satisfied Lord Dundonald not only knew of the negotiation that was going on, but knew it had been agreed to give £2,000, and had also sanctioned that arrangement. and therefore it is that I am of opinion that he ought to feel himself bound by it; and if I had to decide this case I should decide that Lord Dundonald is bound to carry it out, and, moreover, I should certainly decide it in this form of proceedings, and should follow the decisions of the Master of the Rolls and Vice-Chancellor Hall in the case which has been referred to, of *Eden* v. *Naish* (1), where the Vice-Chancellor followed the decision of the Master of the Rolls in Hakes v. Hodgkin. There the Master of the Rolls decided. and in Eden v. Naish the Vice Chancellor Hall decided, that where there is a compromise in an existing suit, the terms of that compromise can be enforced by a separate order in the suit, without having recourse to filing another bill or commencing another action to enforce the terms of the compromise. That was a decision I thought, and which I think still, even before the Judicature Act, would be proper for the court to arrive at, and I accordingly so decided in Pryer v. Gribble ('), where my judgment is given in a note. That went to the Court of Appeal, and their Lordships thought otherwise, and \*that it was neces- [666] sary to have another suit. The consequence was the parties had two more years of litigation, the property went to decay, and they greatly suffered in consequence of the delay and further litigation, and at last it came back to me, and after two years' delay they did exactly what I had decided two years before.

Now, however, there is an alteration in the practice, and I beg to express my entire concurrence with the decisions of the Master of the Rolls and Vice-Chancellor Hall, and

<sup>(1) 8</sup> Ch. D., 177; 17 Eng. Rep., 828. (2) 7 Ch. D., 781; 25 Eng. Rep., 9. (3) Law Rep., 10 Ch., 534; 14 Eng. R., 776.

wherever parties enter into an agreement to compromise a suit pending before me I shall consider it pure matter of course that an order shall be made in that suit to enforce the compromise. I entirely dissent from the argument of Mr. Higgins, that it is only where the plaintiff has to pay something. It is equally binding whether the plaintiff or defendant has to pay or to receive, and therefore I cannot accede to the distinction he drew that there it was the plaintiff who

had to pay something.

Under these circumstances, upon every principle, being, as I am, against Lord Dundonald in this matter, can I enforce the compromise in this suit? In the cases decided by the Master of the Rolls and Vice-Chancellor Hall, it was a compromise of the very suit before him. This matter is a compromise of an action pending in the Court of Common Pleas. I have ordered this cause to be stayed until the trial of that action is concluded. Can I say that that action is concluded? This is either a binding compromise, or it is If it is a binding compromise, I take it to be perfectly clear that the Court of Common Pleas has just the same power to enforce the compromise of an action pending before it as the Master of the Rolls, the Vice-Chancellor Hall, or myself, or any co-ordinate judge, of enforcing it in this court. If, therefore, Mr. Scully can make out that Lord Dundonald has compromised that action, which is for £5,000, on the terms of paying £2,000 and costs, it appears to me unnecessary to follow the course which I should have done if it had been an action pending before me. But the plaintiff can have it decided in a summary manner, because I take it the summary manner will be that the judge of the Court of Common Law will order judgment to be entered against the defendant for £2,000 and costs, as arranged. 667] That, I \*think, is the step which ought to be taken; but instead of that, the motion before me is that I should enforce a compromise of the action in the Common Law Division. That I am unable to do. I have no jurisdiction, I am sorry to say, because the form of the order is that all proceedings in this cause are to be stayed until after the trial, which I say is after the final determination of the action in the Court of Common Pleas.

On that technical point, therefore, I regret that I am obliged to come to a conclusion against the plaintiff, and I cannot, therefore, accede to this motion. But if the Court of Appeal, which has power, can take a different view and enforce this compromise, I should be very glad to hear that they have done so. It is on a purely technical ground. Mr.

Higgins says they never agreed exactly upon the same terms. I think they have agreed so nearly to the same terms that I do not think it creditable to any of the parties, when they have agreed for £2,000 and "your firm's costs," to attempt to say the terms are not settled. Therefore, I leave the matter open for the Court of Common Law to say whether judgment will now be entered for Mr. Scully for the sum of £2,000 and costs. If the Court of Common Pleas so decides, you will have only to come with that judgment and ask me to order—and, as a matter of course I shall order—Mr. Burt on one side, and Mr. Stretton on the other side, to pay such sum of money as is mentioned in the judgment to Mr. Scully, and the balance to Lord Dundonald. That application will be disposed of in chambers, and this motion I must dismiss; but as I think it most unwarrantable. I shall not give any costs.

The plaintiff appealed. The appeal was heard on the

30th of April.

J. Pearson, Q.C., and Beaumont, for the appeal: The court can now enforce a compromise on a summary application: Eden v. Naish ('). The parties have settled the amount of the claim, and a trial of the action in the Common Pleas Division has become impossible. We have a lien on the fund for the amount, the fund has been set apart under an order of the \*court to meet it, and the [668 amount having been settled, we have a right to apply for payment.

Higgins, Q.C., for the defendant: We say that on the evidence there was no agreement, for that the solicitors had only power to enter into a provisional contract, to be confirmed by their principals. If there was an agreement to compromise, we say that there was no jurisdiction to en-

force it on motion: Pryer v. Gribble (\*).

[Jessel, M.R.: In that case there was no fund set apart to abide the order of the court. Here there is an assignment of the fund by the letters.]

That does not remove the objection to enforcing a compromise on motion, and the Judicature Act, 1873, s. 24,

subs. 7, does not help the case.

[JESSEL, M.R.: If the compromise involves nothing beyond the questions raised in the suit, why may it not be enforced on motion?]

Askew v. Millington (\*) decides that it cannot.

(1) 7 Ch. D., 781; 25 Eng. R., 9. (3) Law Rep., 10 Ch., 534; 14 Eng. R., 776. (3) 9 Hare, 65.

JESSEL, M.R.: This appeal is hardly an appeal from the opinion of the Vice-Chancellor, for he was in favor of the appellant except on one small point, viz., whether he was bound to put a narrow construction on the order he had To that extent I differ from the Vice-Chancellor. Substantially the order was an order to set apart a sum of money to answer the plaintiff's claim. The plaintiff having brought an action to establish a lien on Lord Dundonald's interest in a fund, the sum, instead of being set apart in the action, was ordered to be paid to two solicitors to answer the plaintiff's claim, and all further proceedings in the action were stayed with liberty to apply. The stay of proceedings was in form until a certain action pending in the Common Pleas Division had been tried, but the substance of the order was to set apart a fund until the claim was determined, whether by trial of that particular action or otherwise. The liberty to apply is general, and must be 669] \*treated as authorizing an application on the happening of any event which settled the right of the parties. What has happened is that the parties have agreed on the amount of the claim. Such an agreement for compromise is within the purview of the order, which appears to me to be wide enough to enable us to do justice. I agree with the Vice Chancellor that there is a clear agreement by letter for payment of a certain sum, and I do not find that Lord Dundonald denies his agent's authority to bind him. Terms sufficiently definite were agreed upon, and the matter in dispute between the parties was thus settled.

Corron, L.J.: I am of the same opinion, and have only to add that it is important that it should be understood on what grounds we put our decision. I do not rely on the provisions in the Judicature Act, which merely enable the court in which an action is brought to stay proceedings in that action without a bill in cases in which before the act they might on a bill filed have been stayed by injunction. That is not this case. Here under an order a sum was set apart, in form to abide the result of a particular action, but in substance to abide the result of the plaintiff's claim however determined. At the time when the order was made it was considered that the action would go on, so the order took that form, but that does not affect the substance of the The plaintiff's claim has been established not by trial of the action but by agreement between the parties, and it would be unfortunate if we were obliged to say that the action must go on to decide what has been already settled by the parties themselves. The letter of the 14th of Feb-

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ruary, 1878, clearly accepts the offer contained in Stretton's letters of the 19th and 21st of December, 1877, and the amount of the plaintiff's claim is thus settled. The fund has been set apart under an order of the court to answer that claim, and we ought not to require the parties to proceed

with further litigation.

THESIGER, L.J.: I am entirely of the same opinion. plaintiff has established a definite agreement by Lord Dundonald to pay £2,000 and costs in satisfaction of the claims Scully by his \*action in the Chancery against him. Division claimed a lien on the fund. Had there not been any action in the Common Pleas Division, the whole matter would have been tried in the action in the Chancery Division, but there being an action already proceeding in the Common Pleas Division, it was thought better that the claim should be disposed of there, and the order of the 26th of April, 1877, was therefore made in the form in which we find it, staying proceedings till after the trial of the action in the Common Pleas Division. Instead of that action being tried the claim was settled by the parties. This seems to be within the terms of the last part of the order, for unless the claim being settled gives the parties a right to apply, they never could apply at all, since after such settlement there is no way of bringing the action in the Common Pleas Division to deci-I agree therefore that the court had jurisdiction to make the order asked for by the plaintiff.

Solicitors for plaintiff: Bircham & Co. Solicitors for defendant: Newman, Stretton & Hilliard.

[8 Chancery Division, 670.]

V.C.M., April 2: C.A., April 30, 1878.

## HUSSEY V. HORNE-PAYNE.

[1877 H. 275.]

Vendor and Purchaser—Contract—"Subject to the Title being approved by our Solicitors"—Waiver—Abandonment.

The defendant made an offer by letter to sell an estate to the plaintiff, which offer the plaintiff accepted by letter, "subject to the title being approved by my solicitor." After this the plaintiff wrote to say that he must abandon the purchase unless he was allowed to pay the money by instalments. The defendant assented to payment by instalments. Shortly afterwards the plaintiff's solicitor brought to the defendant's solicitor a paper embodying the terms as to payment, and headed, "Proposals by T. H. for purchase of the M. Estate." The defendant's solicitor verbally agreed to these terms, and arranged to instruct his counsel to prepare an agreement on the basis of them, but no such contract was prepared. The defendant having afterwards declined to complete, the plaintiff brought his action for specific performance, and the defendant demurred to the statement of claim, On the argu-

25 Eng. Rep.

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ment in the court below, it was taken for granted that the two letters made a binding contract:

Held, by Malins, V.C., that the negotiations as to payment by instalments did 671] \*not amount to an abandonment by the plaintiff of the original contract, and that the demurrer must be overruled.

Held, on appeal, that the words "subject to the title being approved by my solicitor" were not merely an expression of what would be implied by law, but constituted a new term; that the plaintiff's letter, therefore, was not an acceptance, but a new offer which had never been accepted, and that there was no binding contract.

A. wrote to B. offering to sell him an estate for £37,500, or a part of the estate for a less sum, and added a postscript reserving the right to remove the materials of a house. B. replied: "I beg to acknowledge the receipt of your letter stating that you are willing to accept £37,500 for the whole of your freehold land at N. I hereby accept your terms as above, and agree to pay you the said sum of £37,500 for your land":

Held, by Jessel, M.R., that this was an acceptance of the terms in A.'s letters,

including the postscript.

This was a demurrer to the statement of claim in an action for the specific performance of a contract for the purchase of the Mornington estate, North End, Fulham, consisting of seventeen acres.

The statement of claim alleged that, in the autumn of 1876, the plaintiff, through his agent, Weaver, was in negotiation with the defendant, Mrs. Horne-Payne, for the purchase of the estate to which she claimed to be absolutely entitled for her separate use, and that the negotiation culminated in the agreement contained in the two following letters from Mrs. Horne-Payne to Weaver, and from Weaver to her:—

"4th Oct., 1876.

"Dear Sir,—I cannot accept your offer of £35,000 for my freehold land at North End. I refused that sum for it fifteen months ago when offered by Messrs. Willett through Messrs. Saunders. I am now willing to divide the difference between your offer and my price, and I am prepared to accept £37,500 for the entire freehold property, or £34,500 for the property without the Mornington House and 1½ acre of ground.

"I am, dear Sir, faithfully yours,
"Geo. M. Horne-Payne.

"W. Weaver, Esq."

"P.S.—I shall withhold the right of removing the new materials used in rebuilding Mornington House, and all fixtures, &c., &c.
"Geo. M. Horne-Payne."

672] \*Weaver, on the 6th of October, replied as follows:—
'I beg to acknowledge the receipt of your letter of the
4th inst. stating that you are willing to accept the sum of
£37,500 for the whole of your freehold land at North End

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(including the Mornington House estate), and I hereby, on behalf of Mr. Thomas Hussey, of 96 Kensington High Street, accept your terms as above, and agree to pay you the said sum of £37,500 for your land as aforesaid, extending from Hammersmith Road to the Hammersmith Railway, subject

to the title being approved by our solicitors."

The statement of claim further alleged that in the course of the negotiations which resulted in the above letters Mrs. Horne-Payne had suggested that it would be for the convenience of both parties that the purchase-money should be paid by instalments, and that the plaintiff assented, and accordingly allowed arrangements which he had made for providing the purchase-money to fall through. That on the 12th of October, 1876, the plaintiff, his solicitor, and Mr. Weaver had a meeting with Mr. Crowdy, Mrs. Horne-Payne's solicitor, at which she failed to attend. and that Mr. Crowdy stated that nothing but the immediate payment of a deposit of £10 per cent. and the payment of the residue That the plaintiff, conin a few months would be accepted. sidering himself to have been unfairly treated, directed his solicitors to write, and they, on the 24th of October, 1876, wrote to Mr. Crowdy that, as he stated that he could make no other arrangement for payment of the purchase-money except 10 per cent. as a deposit, and the balance in a few months, Mr. Hussey had no option but to decline the matter, and as soon as Mr. Crowdy's client should be prepared to treat upon the footing of payment by instalments extending over about three years, they would be prepared to negotiate again on Mr. Hussey's behalf.

That on the 25th of October Mrs. Horne-Payne wrote to Mr. Weaver, saying that she had given Mr. Crowdy instructions to accept the offer to pay by instalments in three years

and the deposit down.

That on the 31st of October the plaintiff's solicitor received from Mr. Crowdy a letter containing terms on which Mrs. Horne-Payne was willing to carry out the sale, and that as the terms so \*stated were nearly identical with those [673 agreed upon between Mrs. Horne-Payne and Weaver, the plaintiff's solicitor, on the 14th of November, called on Mr. Crowdy and left with him a statement of terms (headed "Proposals by Thomas Hussey for the purchase of the Mornington Estate") as to the payment of the purchasemoney, and Mr. Crowdy verbally agreed thereto, and arranged to instruct his counsel to prepare a formal contract on the basis thereof. No such contract was, however, prepared.

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The defendants having declined to complete the sale to the plaintiff, the plaintiff now claimed specific performance of the contract contained in the two letters of the 4th and 6th of October, and a declaration that the terms left with Mr. Crowdy on the 14th of November were binding on the parties as a valid interpretation of the original contract, and specific performance thereof accordingly.

The demurrer was heard before Vice-Chancellor Malins

on the 2d of April, 1878.

Bristowe, Q.C., and Bush, for the demurrer: that the letters of the 4th and 6th of October constituted a contract, it is clear by the letter of the 24th of October and the new proposal of the 14th of November, that the parties afterwards considered that there was no concluded contract. The mode of payment of the purchase-money was not set-tled, but was still matter of negotiation. The new nego-The new negotiations cannot be reconciled with the fact of there having been a previous concluded contract. These negotiations never ripened into any contract, and there is nothing of which there can be specific performance, for the proposals of the 14th of November were to be submitted to counsel by the defendant's solicitor: Chinnock v. Marchioness of Ely('); Rossiter v. Miller (\*); Winn v. Bull (\*).

Glasse, Q.C., Pearson, Q.C., and Pope, for the plaintiff: There was a complete contract concluded by the letters of the 4th and 6th of October. The subsequent negotiations as to the mode of payment of the purchase-money by instalments left the \*contract for sale and purchase as it Equal formalities are required to rescind a concluded Lord St. Leonards (') says, "an contract as to conclude it. agreement to waive a purchase contract is as much an agreement concerning lands as the original contract." There must be as clear evidence of the waiver as of the existence of a contract: Carolan v. Brabazon (\*). Negotiations subsequent to a concluded contract need not amount to an abandonment of it: Robinson v. Page ('); Price v. Dyer (');

Moore v. Campbell (\*); Noble v. Ward (\*).

Bristowe, in reply: Robinson v. Page is in the defendant's favor, for the circumstances here show that there was an absolute abandonment of the contract.

1) 4 D. J. & S., 688. (\*) 5 Ch. D., 648; 22 Eng. R., 382, re-

b) 8 Russ., 114. (¹) 17 Ves., 356.

(\*) 10 Ex., 323. (\*) Law Rep., 1 Ex., 117; Law Rep., 2 Ex., 185.

versed 24 Eng. R., 84.
(\*) 7 Ch. D., 29; 23 Eng. R., 379.
(\*) Sug. V. & P., 14th ed., p. 167.
(\*) 3 J. & Lat., 200, 209.

MALINS, V.C.: The offer of the 4th of October was unconditionally accepted in all its terms by the letter of the 6th of October, and formed a concluded contract, and there being no stipulations as to the mode of paying the purchasemoney, it would have to be paid in the ordinary way.

Mr. Hussey, by his letter of the 24th of October, abandoned the contract unless the defendants would waive the immediate payment of the purchase-money, and allow him to pay it by instalments, but they declined to abandon the contract, and on the 25th of October conceded the payment

by instalments.

The subsequent negotiations between the plaintiff and Mr. Crowdy as to the mode of payment of these instalments give some color to the defendant's argument, especially as the terms offered by the plaintiff's solicitor on the 14th of November are headed "Proposals for purchase," but the solicitors had no authority to abandon the original contract and make a new one.

There is nothing, in my opinion, in all these negotiations to rescind the original contract, and the authorities confirm Lord St. Leonards' statement of the law in his my opinion. Concise \*View, one of the best of his works, is that [675] a contract can only be abandoned by as formal an agreement as that which constituted the contract; and the case of Noble v. Ward(') and Robinson v. Page(') show that subsequent attempts to arrange the payment of the purchasemoney do not amount to an abandonment of the original contract. The demmurrer must be overruled on the usual terms.

The defendant appealed. The appeal was heard on the

30th of April.

Bristowe, Q.C., and Bush, for the appellant, in addition to the arguments urged below, contended that the terms introduced by the postscript had not been accepted, and that the words "subject to the title being approved by our solicitors" introduced a new term, Hudson v. Buck ('), and that there never was any binding contract.

Glasse, Q.C., and Pope, for the plaintiff: Hudson v. Buck does not govern this case, the words here being more We contend, moreover, that the decision in that case cannot be sustained, for that the words fairly understood mean nothing more than "provided a good title is

<sup>(&</sup>lt;sup>9</sup>) 8 Russ., 114. (<sup>3</sup>) 7 Ch. D., 688; 28 Eng. R., 808. (1) Law Rep., 1 Ex., 117; Law Rep., 2 Ex., 185.

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shown," which is nothing more than what would be implied

Jessel, M.R.: This is an appeal from the decision of Vice-Chancellor Malins on a demurrer to a claim for specific performance of a contract. The only question upon which I am about to give an opinion is, whether or not two letters which are set out in the first and second pages of the statement of claim amount to a contract. The point on which I am about to decide the case, so far as I am concerned, is one which was not argued before the Vice-Chancellor, and we have not therefore the advantage of any

judgment of his upon it.

The statement of claim alleges that the defendant, Mrs. Horne-Payne, was entitled for her separate use to some free-676] hold land \*called the Mornington Estate, North End, Fulham, and these letters are alleged to amount to a contract for the sale of that estate to the plaintiff for £37,500. The offer made to the plaintiff of the estate at that price was a simple offer containing no reference whatever to title. The alleged acceptance was an acceptance of the offer, so far as price was concered, "subject to the title being approved by our solicitors." There was no acceptance of that additional term, and the only question which we are called upon to decide is, whether that additional term so expressed amounts in law to an additional term, or whether it amounts, as was very fairly admitted by the counsel for the respondents, to nothing at all, that is, whether it merely expresses what the law would otherwise have implied. The expression "subject to the title being approved by our solicitors" appears to me to be plainly an additional term. does not give a right to the purchaser to say that the title shall be approved by any one, either by his solicitor or his conveyancing counsel, or any one else. All that he is entitled to require is what is called a marketable title, or, as it is sometimes called, a good title. Therefore, when he puts in "subject to the title being approved by our solicitors," he must be taken to mean what he says, that is, to make it a condition that solicitors of his own selection shall approve of the title.

The matter has been recently and fully discussed by Mr. Justice Fry in *Hudson* v. *Buck* ('), and as I entirely agree with his observations on the nature of the condition, it is unnecessary for me to repeat them. The result, therefore, is, that there is no contract.

I am not satisfied that the appellant could succeed upon

the other grounds alleged. It does not to me by any means clearly appear that the estate, as regards boundaries, is not one and the same; in fact, I am satisfied that it is, and that the plaintiff meant to describe the same estate which the defendant meant to describe. Of course, if that is so, the question of boundaries is a mere question of parcels, which could be ascertained irrespective of the terms of the letter,

the estate being sufficiently named.

The other point is a very peculiar one, and is more open to argument and discussion. The letter of the 4th of October being a lady's letter she added a postscript. The postscript is this: "I \*shall withhold the right of remov- [677 ing the new materials used in rebuilding Mornington House; and all fixtures," &c., &c. Now, the plaintiff is a builder, and he was to take that land as building land, and I presume that she meant this—"You will not want the house, you must pull it down, and therefore as there are new materials which were used in rebuilding it, and which will be useful to the vendor, the vendor may take them away." In answering that letter the plaintiff begins by saying, "I beg to acknowledge the receipt of your letter of the 4th instant." Then he states the substance of the letter, there being an alternative offer to take the estate without the house and an acre and a half of land. He states the alternative of taking the whole estate without saying anything about the postscript, and then he says, "I hereby, on behalf of Mr. Thomas Hussey, of 96 Kensington High Street accept your terms as above." Now, what does "as above" mean? I think it "As above" refers to the letter as means the whole terms. much as it refers to the portions stated of it, and I am of opinion that the plaintiff intended to accept the offer as it stood, and he has sufficiently expressed that intention. think that but for the one term, of which I have already spoken, there would have been a contract.

The next point taken was that the contract was abandoned. Now I think it very probable that if this case had ever come on for trial it would have resulted in showing that (apart from the point as to the solicitor approving the title) there never had been a contract at all, and that what passed was only a negotiation from beginning to end. We are, however, on demurrer, and defendants who choose to demur must take the statements in the statement of claim as they find them, and in this case it does not appear to my mind to be so clear on the statement of claim that that was the true state of the case as to make this objection sustainable. That being so, it seems to me, according to the usual

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rule of the Court of Appeal, that the demurrer should now be allowed with costs, and that there should be no costs of

the appeal.

Corton, L.J.: I agree that the demurrer ought to be allowed, but I do so upon a ground which admittedly was 678] not argued before the Vice-Chancellor, \*that upon the construction of the letters of the 4th and 6th of October there was no concluded contract between the parties. To make a contract by letters, or by offer and acceptance, what you must find is this, an offer and a simple unconditional acceptance, that is to say, an acceptance not introducing any new term. If a new term is introduced, it becomes no longer an acceptance but a new offer, which must be ac-

cepted before there is any contract.

Now, is there not a new term introduced by the last words of the letter of the 6th of October, "subject to the title being approved by our solicitors"? The argument on behalf of the respondent is this, that these words are merely surplusage, and express nothing but what the law would itself have implied. In support of that view Mr. Pope relied upon observations made by Mr. Justice Fry, that the objection taken by a solicitor to a title under a term of this sort, if it is agreed to by both parties, must be a reasonable objection, but that by no means shows that it is not a new Putting this term in the way in which Mr. Pope suggested it ought to be read, "subject to the solicitors, provided they act reasonably, being the judges whether there is a good title or not," it is something entirely different from the rule of law, which is, that the judge, subject to the ordinary right of appeal, is the person to decide whether or no a good title can be made. That is what the law provides independently of stipulation, but this stipulation would make the solicitor, provided he acted reasonably and bona fide, the sole and absolute judge as to whether there was or was not a good title. If he acted reasonably and bona fide the court (assuming that the term had been assented to and made part of the contract) would not inquire whether his objections were well founded in law. being so, these words introduce a new term, and the letter is not an acceptance pure and simple of the offer contained in the previous letter.

On the other point which has been dealt with by the Master of the Rolls, as regards the matters arising upon the let-

ter, I need not add anything to what he has said.

As regards the question of abandonment, that is a point which we could not possibly decide upon demurrer. It was

quite right of the defendant to ask the judgment of the court upon demurrer \*as to whether there was a contract that could be enforced, but the point upon which we decide the demurrer was not taken in the court below, and we are not in a position to say that our judgment would be in favor of the defendant on the question of abandonment. As our decision in favor of the defendant turns upon a point not raised by him in the court below, I agree with what the Master of the Rolls has said as to the costs.

JESSEL, M.R.: Lord Justice Thesiger has been compelled by public duties to leave the court, and he desires me to say that he entirely concurred with the other members of the court.

Solicitors for plaintiffs: Kynaston & Gasquet. Solicitors for defendants: Crowdy & Son.

See 18 Eng. Rep., 228 note; 23 Eng. Rep., 813 note; Id., 499 note; 21 Alb. L. J., 465.

An agreement was made with an artist for a portrait that it need not be taken or paid for if unsatisfactory. Held that however good the picture is, the customer is the only judge whether it suits him or not, and if not he cannot be compelled to pay for it: Gibson v. Crenage, 39 Mich., 49.

Plaintiff, who had a house and lot in New York city to sell, and defendant, who desired to purchase the same, negotiated concerning the sale. They agreed upon the price, \$58,000. Plaintiff then produced two blank contracts, with a description of the premises filled in, and handed them to P., who was present as a friend of the defendant, to complete the filling up as to terms, payments, etc. When this was done, the parties signed the contract in duplicate, and P. attached his name as witness. While the papers lay upon the table in the possession of P., defendant inquired of plaintiff if he had the papers in respect to the title. Plaintiff said he had no papers, not even his deed, and defendant then suggested that before proceeding further the matter should be submitted to his counsel for approval, which was assented to by plaintiff, and the parties then went to the office of the counsel, and finding him absent left the papers with a clerk, together with a check of \$2,000 (the amount to be paid down) payable to the order of counsel's firm, with directions to deliver them if the counsel should approve them. The counsel, on his return, did not approve the title, but expressly rejected it as defective. Held, that there was not an execution of the contract so as to bind defendant: Kime v. Keith, 109 E. C. L., 34. The case of Xenos v. Wickham, L. R., 2 H. of L., 296, does not sustain another conclusion. Although the parties agreed orally upon the terms of sale and purchase, the defendant never intended to consummate the contract until he was satisfied as to the title, and the contract was never consummated by delivery: Dietz v. Farish, 21 Alb. Law Jour., 133.

The parties must be consenting bargainers, personally or by delegation, and their coming together in contract relation must be manifested by some intelligible conduct, act or sign. If not, no contract is made: Woods v. Ayres, 39 Mich., 351, and cases cited; Dix v. Shaver, 14 Hun, 392.

See Spencer v. Harding, L. R., 5 C.

Pl., 561

A., who bought ice of B., ceased to take it on account of dissatisfaction with B., and contracted for ice with C. Subsequently B. bought C.'s business and delivered ice to A. without notifying him of his purchase until after the delivery and consumption of the ice. Held, that B. could not maintain an action for the price of the ice against A.: Boston, etc., v. Potter, 123 Mass., 28.

Though it is not essential that the promise should be express. It may be implied from circumstances; and it may rest on both; that is, on express words, and on conduct and acts reasonwords, and on conduct and acts reasonably leading to the same conclusion: Hotchkins v. Hodge, 38 Barb., 117; Kenyon v. People, 26 N. Y., 203; Fried v. Royal, etc., 47 Barb., 127; Tilt v. La Salle, etc., 5 Daly, 19; Buck v. Worcester, 46 Verm., 2; Dent v. North Am., etc., 49 N. Y., 390; Mayer v. Lansingburgh, 49 N. Y., 657; Dutch v. Mead, 36 N. Y. Supr. Ct. R., 427; Linsley v. Tibbals, 40 Conn., 522; Bishop v. Busse, 59 Ills., 403. Bishop v. Busse, 59 Ills., 403.

See Gage v. Jaqueth, 1 Lans., 207; Justice v. Lang, 42 N. Y., 493; Spencer v. Harding, L. R., 5 C. Pl., 561; Grove v. Hodges, 55 Penn. St. R., 504.

Where an alternative offer of letting or selling is made by a letter, a contract is sufficiently constituted by an answer accepting the offer as to a sale: Morrison v. Neill, 1 Victorian Law R. (Law),

Where an offer has been made and accepted, if it be understood by both parties as a mere jest, it is not binding although it is formal and complete: 1 Story on Cont. (5th ed.), § 508; Armstrong v. McGhee, 1 Addison (Pa.) R.,

The defendant and one Sleeper were in litigation about a cow which the defendant had sold to Sleeper, and which Sleeper then owned. The plaintiff, then at work for Sleeper, made some remark to the defendant about the value of the cow, and the latter told the plaintiff that he would give forty dollars for the cow if the plaintiff would deliver her to the defendant in as good condition as she was when Sleeper bought her. The plaintiff did not accept the offer, but went away expressing an intention to get the cow and drive her to the defendant the next Held, that this was no sale and no agreement binding on either party in respect to the cow; and the plaintiff's buying the cow and driving her to defendant's yard the next day, in the defendant's absence, and notifying defendant's wife what he had done, imposed no obligation on the defendant in order to prevent liability for the cow. And held that, under the circumstances of the case, it should have been

left to the jury to find whether the conversation was intended and understood to be merely jocose and not in earnest: Bruce v. Bishop, 43 Verm., 161.

Where a conversation is relied upon as proof of an agreement, it is for the jury to decide whether such an assent of the minds of the parties took place as to constitute a valid contract, or whether what passed between them was a loose conversation, not understood or intended as an agreement: Thurston v. Thornton, 1 Cush., 89.

Mr. Townsend (Lives of Eminent Judges, vol. 1, p. 99) gives the following of that great jurist Lord Kenyon: "He would not countenance any oblique and tricking conduct. A lady having had repeated promises, and fearing her lover's fickleness, procured two young women to listen to a conversation, in which she put the question home, 'When do you mean to marry me?' The lover answered off-hand, 'I will marry you as soon as I return from Nottingham.' Lord Kenyon did not approve of this clever trepanning; and the jury influenced by his displeasure at the stratagem, and wishing to deter others from a similar artifice, found for the defend-The court refused a new trial, on the ground that the promise should have been made in a solemn manner, and not swindled out of him in desultory talk."

In the absence of previous arrangement, one person cannot, merely by an offer, place another in the position of being compelled to give an answer; and in such case silence does not evidence acceptance of the offer: Boyd v. Holmes, 4 Victorian Law Rep. (Eq.),

The parties must both assent to the same thing in the same sense, or they make no contract: Willard's Eq. Jur., 69-70 marg. p.; 1 Pars. on Cont. (6th ed.), 475-480; 2 id. (6th ed.), 488 and note g.

Canada, Upper: Riley v. Spotswood, 23 U. C. C. Pl., 318; Talbot v. Hamilton, 4 Grant's Chy., 200; Mc-Laughlin v. Whiteside, 7 id., 573; But-

ters v. Glass, 31 U. C. Q. B., 379.
English: Wycomb v. Donnington, etc., L. R., 1 Ch. App., 268; Bramah v. Bramah, Anold & Hodges, 8.
Hilnois: Fox v. Turner, 1 Bradw.

153; Smith v. Wetherell, 4 Bradw.,

Hussey v. Horne-Payne.

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655; Rupley v. Daggett, 74 Ills., 851; Shores v. Barker, 88 Ills., 212. Iowa: Steele v. Miller, 40 Iowa,

Ireland: Gradwell v. Maguire, Ir. R., 6 Eq., 477; Gardiner v. Tate, Ir. R., 10 C. L., 460.

Louisiana: Connell v. Hill, 30 La., Ann., 251.

Maine: Belfast v. Unity, 62 Maine,

Massachusetts: Harlow v. Curtis, 121 Mass., 320.

Missouri: Bruner v. Wheaton, 46 Mo., 363.

Nevada: Morrill v. Tehama, etc., 10 Nev., 125.

New Jersey: Potts v. Whitehead, 23 N. J. Eq., 512.

New York: Dietz v. Farish, 21 Alb. L. J., 133, Court Appeals, affirming 44 N. Y. Superior Ct. R., 190, 53 Ing 44 N. I. Superior Ct. R., 190, 05
How. Pr., 217; Baptist Ch. v. Brooklyn, etc., 28 N. Y., 153; Vassar v.
Camp, 11 id., 445-6; Hough v. Brown,
19 id., 111; Sourwine v. Truscott, 17
Hun, 432; Dix v. Thorn, 14 Hun, 392; McGrath v. Brown, 66 Barb., 481; Tuttle v. Love, 7 Johns., 470; Button v. Phillips, 24 How. Pr., 111; Fielder v. Tucker, 18 How. Pr., 9; Dana v. Munro, 38 Barb., 533-4; Phillips v. Berger, 8 id., 529; Calkins v. Falk, 39 id., 620; Tyler v. New Amsterdam, 4 Rob., 155.

United States, Circuit and District: Snow v. Miles, 3 Cliff., 608. Vermont: See Buck v. Worcester,

46 Verm., 2.

Wisconsin: Bates v. Chesebro, 36 Wisc., 636.

Where there is a mutual misunderstanding between the vendor and purchaser as to the terms of the sale, neither party is bound by the supposed agreement, there being in such a case no assent to the contract: 1 Story's Eq. Jur., § 144; Baldwin v. Mildeberger, 2 Hall, 176; Pettigrew v. Mayor, 17 How. Pr., 492; Mumford v. Whitney, 15 Wend., 380; Peltier v. Collins, 3 id., 459; New York, etc., v. North Western, etc., 10 Abb. Pr., 34, 31 Barb., 72.

Where the parties misunderstood the consideration, one at £725 and the other at £735, held there was no agreement: Boyce v. Lapesh, 3 Victorian Law R. (Eq.), 75.

After an agreement between the parties, the seller told the buyer he could not have the goods unless he paid an additional price. The buyer claimed to have them at the price in the original agreement, but the seller answered that if he would not take them at the additional price he should not have them at all. After that, that the defendant directed that the globes should be sent to him. The court said: "The plaintiff had not, of course, any right to change a part of the contract upon his own volition. The proposed alteration, to bind the defendant, should have been positively assented to by him. The evidence was not, in my opinion, sufficient to prove such assent. In giving the direction that they should be sent to him, he may have relied upon his rights under the original agreement. He insisted, as he had a right to insist, that the articles should be delivered to him at the price originally specified. The plaintiff, certainly without any sufficient reason, demanded the additional price. No agreement was directly made at the time. I think that under the circumstances the plaintiff should be held to his agreement, and that the referee erred in allowing him the additional compensation:" Moffett v. Sackett. 18 N. Y., 526.

In a contract between the parties for the sale and delivery, by plaintiff to defendant, of a quantity of timber, was contained a clause by which defendant agreed to pay plaintiff a price stated for a specified additional quantity of the same kind and quality of timber delivered during the winter at a place named; there was no agreement, on the part of the plaintiff, to deliver the additional quantity. In an action to recover for timber alleged to have been delivered under this clause, it appeared that after plaintiff had delivered a portion of the timber called for by it, defendant told him he did not want him (plaintiff) to get out any more timber; plaintiff replied that he had bought some timber and advanced money in payment, and "could not get out of that." Nothing further was said, and plaintiff continued to deliver at the place designated, defendant making no further objection. After the delivery defendant, when spoke to about it, said, at different times, he would go and look at the timber, making no claim that the contract had been rescinded; held, that the clause referred to did not make a binding contract, as plaintiff did not bind himself to sell and deliver the timber; that it was simply an offer, on the part of defendant, which could be revoked at any time before performance, or a binding acceptance by the plaintiff, but that proof of the revocation, under the circumstances, should have been unequivocal and satisfactory before a court could hold as a matter of law that the revocation was established; that the evidence fell short of this, and the question was one for the jury: Quick v. Wheeler, 78 N. Y., 300.

Where there is no express agreement, between landlord and tenant, as to the price to be paid by the latter for the use and occupation of premises, the landlord should be allowed what the use of the premises is reasonably worth.

The fact that a conversation has taken place between the parties, in which both parties supposed an agreement was made as to the amount of rent to be paid, will not prevent the landlord from recovering upon an implied agreement, where it appears that the parties differed in their understanding of the amount to be paid: Scranton v. Booth, 29 Barb., 171.

Where one party to a contract, at the time he executes it, so conducts himself as to lead a reasonable man to believe that he understands and assents to its terms, and the other party, so believing, executes and performs it on his part, the former is precluded from asserting that he did not so understand and assent, and is bound by it : Phillip v. Gallant, 62 N. Y., 256, modifying 1 Hun, 528, 8 Thompson & Cooke, 618.

The plaintiffs, who were potters at Peterborough, sent an order to defendants at Toronto for \$9 worth "of stone spar, such as potters use." Defendants answered, acknowledging the receipt of the money, "which we have placed to your credit for stone." The order was entered in the order book as for stone, but defendants' manager crossed it out and wrote ground flint, thinking that must be what was meant, though he said he might as well have sent Cornish stone.

The evidence showed that spar or feldspar was a substance used in the United States for the same purpose for which stone or Cornwall stone is used in England. The flint was sent in a

barrel which the defendants said was marked flint, and the railway receipt to them was for "one barrel flint." The station master at Peterborough entered it from the way-bill as one barrel fluid. The plaintiffs alleged that the barrel was not marked "flint," that the railway notice described it as fluid. they received and used it, assuming it to be stone as ordered, there being nothing in the appearance to distinguish it, and they having before got stone from the defendants. Being thus used instead of stone it destroyed the plaintiffs' ware, and for this the plaintiffs sued.

The jury were directed that defendants were liable if the order sent by the plaintiffs should have been understood by defendants as an order for Cornwall stone, and if the plaintiffs were justi-fied in believing that the article sent was, and did not know that it was not such stone, but that if defendants were justified in sending ground flint on the order received, they would not be liable—and they found for the plaintiffs,

Held, reversing the judgment of the county court, on which a nonsuit had been afterwards ordered, that the direction was right, and that the verdict should have been upheld, and that it was not a case in which the parties' minds were not ad idem, so that no agreement had been made: Baker v. Lyman, 38 U. C. Q. B., 498.

Though where the parties are corresponding by mail as to the contract, acceptance or deposit of the contract in the post office consummates it: Vassar v. Camp, 11 N. Y., 441, 14 Barb., 841.

But see Button v. Phillips, 24 How.

Pr., 111.

Though the rule does not apply to Wood 26 How. telegraphs: Trevor v. Wood, 26 How. Pr., 451, 467.

Where a proposition for a contract, to be in writing and executed by the parties, has been made by one party and accepted by the other, the terms of the contract being in all respects definitely understood and agreed upon, the party refusing to execute the contract is responsible, it seems, on the breach of his agreement, for the same damages as would be recoverable for an entire refusal to perform the contract after its execution in writing.

An action may be maintained upon the contract as completed, by the offer

and acceptance: Pratt v. Hudson, etc., 21 N. Y., 305.

No one can evade the force of the impression which he knows another received from his words and conduct, and which he meant him to receive, by resorting to the literal meaning of his language alone. Every one is responsible for the belief he intentionally creates, whether by words or otherwise, and will be precluded from profiting by any unconscionable use of an obligation which has been thus wrongfully obtained: Mizner v. Kassell, 29 Mich., 229.

A promise is to be interpreted in that sense in which the promisor knew that the promisee understood it: Barlow v. Scott, 24 N. Y., 40; White v. Hoyt, 73 N. Y., 505, 511; Johnson v. Hathorn, 3 Keyes, 126, 2 Abb. Ct. App. Dec., 465; Hoffman v. Ætna Ins. Co., 32 N. Y., 405; Potter v. Ontario, etc., 5 Hill, 147; Farley v. Pettes, 5 Mo. App. R., 262; Gunnison v. Bancroft, 11 Verm., 493; The Ada, Davies' (U.S.) Rep., 407, 411; Riley v. Spotswood, 28 U. C. C. Pl., 318.

See Beams v. Columbian, etc., 48
Barb., 453-4; Wycomb v. Donnington,
etc., L. R., 1 Ch. App., 268.
Accordingly, where the vendor of
land undertook to execute such a conveyance as he had received from his grantor, which he said was a warranty deed-the same in fact containing only a covenant against the acts of the grantor-the purchaser, although he saw the deed under which the vendor held, understood it to be, and understood the vendor to promise, a deed with a general warranty, and the vendor knew that such was his understanding: held that the vendor was bound to convey with general warranty: Barlow v. Scott, 24 N. Y., 40.

W. contracted to sell to C. all the lumber he should manufacture, or have manufactured for him at a certain place and time; and having logs at that place in time, which H. had agreed to saw for him, he entered into a contract by which he nominally sold them to H., but agreed to take his pay in lumber at a specified price less than the market price. Held, that this was a mere device to evade his contract with C., and that he was liable to C. for not delivering said lumber to him: Cain v. Weston, 26 Wisc., 100.

The plaintiff offered to sell to the defendant, oats, and exhibited a sample; the defendant took the sample, and on the following day wrote to say that he would take the oats at the price of 84s. per quarter. The defendant afterwards refused to accept the oats on the ground that they were new, and he thought he was buying old oats: nothing, however, was said at the time the sample was shown as to their being old; but the price was very high for new oats. The judge left to the jury the question whether the plaintiff had believed the defendant to believe, or to be under the impression, that he was contracting for old oats, and, if they were of opinion that the plaintiff had so believed, he directed them to find for the defendant. The jury having found for the defendant; held, that there must be a new trial:

Per Cockburn, C.J., on the ground that the passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract.

Per Blackburn, J., on the ground that there is no legal obligation in a vendor to inform a purchaser that the latter is under a mistake, not induced by the act of the vendor; and that the direction did not bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old, and agreeing to take the oats under the belief that the plaintiff contracted that they were old.

Per Hannen, J., on the ground that the direction did not sufficiently explain to the jury that, in order to relieve the defendant from liability, it was necessary that they should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that the plaintiff believed the defendant to believe that he, the plaintiff, was contracting to sell old oats: Smith v. Hughes, L. R., 6 Q. B., 597.

Where, in an action against a party for a forfeiture of a contract executed in duplicate, the copies produced by the respective parties vary in their phrase-ology, the court will follow the copy which is in the defendant's hands, and by which he was governed in making his payments: Judd v. Ensign, 6 Barb., 258.

See Tilt v. La Salle, etc., 5 Daly, 19.

In re European Society Arbitration Acts.

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[8 Chancery Division, 679.] C.A., Jan. 28, 29; Feb. 1, 4, 26, 1878.

In re European Society Arbitration Acts.

Ex parte Liquidators of the British Nation Life Assurance Association.

Ultra Vires—Purchase of Business by Company—Transfer to purchasing Company of Shares of selling Company.

The B. N. Company was an insurance company established with £10 shares, under a deed of settlement which provided that every instrument whereby the company became liable to pay money should contain a clause limiting the liability of shareholders to the amount payable on their shares. The deed contained a power to the company, with the sanction of an extraordinary general meeting, to purchase the business of any other company of a similar nature, upon such terms as the meeting should think fit. The company resolved to purchase the business of the B. C. Company, an insurance company whose capital was divided into £50 shares, on each of which £5 had been paid, and whose deed of settlement contained no power to sell the business. The transaction was completed by purchasing the shares of the B. C. Company, which were transferred to various officers of the B. N. Company. Subsequently a deed was executed by which these transferees transferred their shares to the B. N. Company, and thereupon that company was entered on the register of shareholders of the B. C. Company, and remained so registered for some years. This deed was never sanctioned by a general meeting of the B. N. shareholders. An order having been made for winding up the B. C. Company:

[680] Held, that the transfer of the shares to the B. N. Company was ultra \*vires\*.

and invalid, and that the B. N. Company could not be placed on the list of contribu-

tories of the B. C. Company.

By the European Arbitration Act, 1875, it was enacted that as regards any determination or order given or made before the passing of the act, no appeal should lie therefrom unless the arbitrator expressly certified in writing that by reason of differences between previous decisions on matters of principle it was desirable that an appeal should be brought:

Held, that a formal certificate from the arbitrator, and not a mere expression of opinion, was necessary to give the Court of Appeal jurisdiction; and that differences between previous decisions referred to decisions before the passing of the act.

This was an appeal by the liquidators of the British Nation Life Assurance Association (hereinafter called the British Nation) against the decision of Mr. F. S. Reilly, the arbitrator appointed under the European Assurance Society Arbitration Acts, 1872, 1873, and 1875, to the effect that the British Nation should be put on the list of contributories of the British Commercial Insurance Company, and should be ordered to pay such call as might be necessary to discharge the British Commercial liabilities and the costs of the British Commercial liquidation; and that the liability of the British Nation in respect of such a call was unlimited, except so far as it was limited by the terms of the British Commercial policies and other contracts.

The British Commercial was established by a deed of settlement dated the 1st of May, 1821, with a nominal capital of £1,000,000, divided into 200,000 shares of £50 each. 12,000 of those shares were subscribed for, and calls to the amount of £5 a share were made thereon. It was an unregistered company within Part VIII of the Companies Act, 1862. The deed of settlement contained the common clause providing for the insertion in its policies and other contracts of a provision that the contracting party should only look to the funds and uncalled capital of the company. And it did not contain any power enabling the company to transfer its business to another company.

The British Nation was established by a deed of settlement dated the 28th of February, 1855, with a nominal capital of £300,000, in shares of £1 each, subsequently altered to shares of £10 each. Its objects included all the usual business of a fire and life insurance company. It was completely registered under 7 & 8 Vict. c. 110, and on the 3d of November, 1862, was registered \*under the Com- [68] panies Act, 1862. The provisions to which notice was called

during the argument were the following:-

"44. That two extraordinary general meetings shall have full power to extend the objects of the association to the making or effecting insurances on ships or vessels and their cargoes against loss or damage by fire, and against capture and other sea risks, and to the undertaking of any other such business as is usually undertaken by underwriters, and to make new laws, regulations, and provisions for the association, or to amend, alter, or repeal, either wholly or in part, all or any of the existing laws, regulations, and provisions of the association, provided that such extensions of the objects of the association, and such new, amended, or altered laws and provisions shall have been previously recommended by the board, and do not extend to, amend, alter, or repeal any provisions hereby expressly declared to be unalterable, or any of the laws, regulations, or provisions hereby established for limiting the individual responsibility of shareholders, and subject in all cases to the provisions and regulations of 7 & 8 Vict. c. 110, and these presents.

"45. That an extraordinary general meeting may accept or take a transfer of or purchase or acquire the business of any other associations, companies, or societies of a similar nature (wholly or in part) with the association hereby established, upon and under such terms, conditions, stipulations,

and agreements as such meeting shall think fit."

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"91. That the board shall, as respects every life policy and other policy issued by the association, and every grant of annuity by the association, and every other instrument whereby a liability to pay any sum or sums exceeding in the whole the sum of £5 shall be incurred by the association (except in the cases specially provided for in clause 187, and except in the case of the lease of any house or offices rented by the association), cause to be inserted therein, either in express words or by reference to this present clause, a declaration that the capital, stock, and funds of the association shall alone be liable to answer and make good all claims under such policy, grant of annuity, or other instrument (as the case may be), and all other claims whatsoever against the said association, and that no director, 682] proprietor, or member of \*the association shall in any manner be personally liable or subject to any such claims, or be bound by reason thereof to do anything more than (as respects a proprietor) to pay to the proper officers of the association the amount (if any) due from him to the association in respect of instalments upon his share or shares in the capital of the association."

Clause 187 prohibited making or issuing promissory notes or bills of exchange in the name or on the behalf of the association, and it also forbade the acceptance of bills by the association, except bills drawn by persons abroad for moneys payable in respect of claims under policies. Such last men-

tioned bills were not to be subject to clause 91.

Clause 119 gave extensive powers of investing the moneys in hand which were not required to satisfy immediate claims, and, inter alia, it was provided that the board, with the consent of not less than three directors present, might invest "in the purchase of shares in any docks, canals, rivers, navigations, waterworks, bridges, piers, railways, or turnpike roads established by act of Parliament . . . . or in the purchase of any personal property of any nature or kind whatsoever, or of any debts, claims, and demands, or interests whatsoever, and of what nature or kind soever."

On the 17th of November, 1859, Henry Lake, the manager and secretary of the British Nation, in accordance with a resolution of the British Nation board of directors, passed on the same day, addressed the following letter to the directors of the British Commercial:—

"Gentlemen,—It has been suggested to the directors of this association and to myself that a union of the business of the British Commercial Insurance Company with this

association would be advantageous to both institutions, and for the following reasons:

"First. The proprietary of the British Commercial might, if they so desired, be paid off at a price to be agreed upon—say 25s. per share, and transfer of such shares be taken by

trustees to be appointed by this association.

"Second. This association having a business of nearly £30,000 \*a year at present arising from policies of an [683 average of under three years would supply the older policies of the British Commercial, the element which alone is necessary to give force and value to its business. For the increased amount of the annual premium income would be better enabled to bear the certain claims which must arise from the older business of the British Commercial without, for many years to come, entrenching upon the assets reserved, thus protecting the company from the disastrous effects of a disturbed rate of mortality. A further negotiation for young life business, which as your directors may be aware, carries with it invariably a large amount of future profit combined with greatly increased security, is pending, and on the very eve of completion, by which an addition of £20,000 a year will be made to the income of this association, forming a gross income of £50,000 per annum.

"Third. This association possesses a staff of nearly 1,000 agents, now producing a large amount of new business, which is rapidly increasing, and all anxious to co-operate with the directors of this association in the effort to obtain an increased connection, and it may be fairly urged that with the business of the British Commercial in union with this association the agents of that company will be more likely to work with vigor for the combined institutions and to obtain more business in consequence than could be expected under existing circumstances from the agents of the

British Commercial alone.

"Fourthly. The shareholders in this association are upwards of 300 in number, and they are prepared in every possible way to co-operate in the endeavor to increase the business of the institution, and from this circumstance also the British Commercial connection will derive an increased advantage, there being a reserve of actually subscribed capital amounting to £92,500.

"Under these circumstances the directors of this association would be glad if the directors of the British Commercial would consider this letter as a basis of a proposition for a union of the business of the British Commercial

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and British Nation Companies upon the following under-

standing:

"The shareholders of the British Commercial should be paid off at the rate of 25s. per share, and their shares transferred.

684] \*"That the directors of the British Commercial, with the consent of the shareholders, be paid a compensation

of £1,000 by this association.

"That the staff of the British Commercial be retained by the British Nation, and that the directors of the British Nation be at liberty to apply to any director or officer of the British Commercial to assist this association in the completion of such proposed arrangement after the shareholders have decided upon its adoption.

"That the trustees should be appointed to hold the assets of the British Commercial pending the completion of the

proposed arrangement.

"That an act of Parliament should be forthwith applied for if agreed to be necessary to consolidate the proposed union.

"Thus a strong company may be formed, to the permanent benefit of all interested."

By a resolution passed on the 2d of January, 1860, the directors of the British Commercial resolved that the directors of the British Nation should be informed that the board accepted the offer contained in the foregoing letter, subject to the approval of their shareholders, and also resolved that a special extraordinary meeting of the shareholders should be called on the 21st instant, to consider the offer of the British Nation, for its adoption or otherwise, and that the meeting should be advertised as therein mentioned. The meeting was advertised accordingly, and on the 6th of January, 1860, a circular was issued to the shareholders of the British Commercial as follows:—

"Sir,—Herewith you will receive a formal notice convening an extraordinary or special meeting of the proprietary for the 21st inst. The object of the meeting is to consider a proposal for the union with or transfer of the business liabilities and assets of this company to another company.

"I am instructed to inform you that the proposition above referred to has been under the consideration of the directors of this company for some time past, and after careful investigation they have arrived at the unanimous resolution to adopt and accept the same, subject to the approval and con-685] firmation of the \*shareholders. I may add that the

proposition contains an offer of 25s. per share to the share-holders of the British Commercial, who will also be relieved of their liabilities in respect of such shares."

The notice referred to in this circular was for an extraordinary meeting on the 21st, for the following purposes, viz.:—

"1st. For the purpose of considering a proposal for the union or 're-assurance' with or transfer of the business liabilities and assets of this company to another company.

"2d. For the purpose of adopting and accepting or otherwise the offer contained in the proposal for union or transfer

above referred to.

"3d. For the purposes of investing the directors with necessary powers to enable them to complete and forthwith to carry out such union or transfer, and for the purpose of dissolving the said British Commercial Life Insurance Company, should that course be deemed expedient."

At the meeting of the British Commercial, held accordingly on the 21st of January, 1860, it was (amongst other things) resolved:—

"1st. That the proposal of the British Nation Life Assurance Association as contained in their letter of the 17th of November last, now read, be and is hereby adopted and

accepted.

"2d. That with a view of carrying out the last resolution for the union of the two companies, the shareholders of this company present at this meeting do approve of and accept the proposal made on behalf of certain members of the British Nation Life Assurance Association for the purchase of shares in this company at the price of 25s. per share.

"3d. That the directors be and are hereby authorized and

"3d. That the directors be and are hereby authorized and empowered to take such steps in accordance with the provisions of the deed of settlement of this company as may be necessary to carry such proposal into effect on behalf of the

shareholders."

An extraordinary general meeting of the British Nation shareholders was convened for the 20th of January, 1860, by a notice stating that the meeting was to be held for the purpose of \*investing the directors under the 45th [686 clause of the deed of settlement with the necessary powers for taking to the business of another life assurance company, and for the purpose of making certain alterations in the deed of settlement, namely, as to the time of holding ordinary general meetings; as to voting by ballot; as to re-

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muneration of auditors; as to the calling of general meetings; &c. The meeting was accordingly held on the 20th of January, and the notice convening it, and the British Nation manager's letter of the 17th of November, 1859, and the British Commercial directors' resolution of the 2d of January, 1860, were read, and it was resolved:—

"[I.] That this meeting having heard the terms of the proposed arrangement with the British Commercial Company approves of the same, and hereby authorizes and empowers the directors of this company to take such steps as they may consider necessary for carrying the same into effect, and to issue in lieu of the payment of 25s. per share to such proprietors of the British Commercial Insurance Company as may elect to receive the same shares in this association either wholly or in part paid up to the extent of 30s. for each British Commercial Insurance Company's share so held by such proprietors as aforesaid.

"[II.] That George Bermingham, the chairman of this association, and the manager, Henry Lake, be and they are hereby appointed trustees of this association, with such trustee as may be named on the part of the British Commercial Insurance Company, for the purpose of holding the assets, &c., in trust of the British Commercial Insurance Company, and for other arrangements pending the complete

transfer of that company to this association.

"[III.] That pending the completion of the arrangements with the British Commercial Insurance Company with this association the manager and secretary, Mr. Lake, be and he is hereby permitted and allowed to accept the appointment of manager to the British Commercial Insurance Company.

"[IV.] That the directors of this association be and they are hereby empowered to appoint from time to time such trustees, whether shareholders or others, as may in their discretion be necessary for holding such shares of the British Commercial Insurance Company as in the arrangements 687] contemplated may be \*required to be transferred, and that such trustees be and they are hereby indemnified from any liability in respect of the British Commercial shares so transferred save in their capacity of shareholders in this association."

These resolutions were confirmed at a second meeting on

the 4th of February, 1860.

Two deeds, dated respectively the 8th of February and the 7th of June, 1860, were executed for carrying into effect the arrangement authorized by the foregoing resolutions. C.A. Ex parte British Nation Life Assurance Association.

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The deed of the 8th of February, 1860, was an indenture expressed to be made between Bermingham and Lake of the first part, the persons named in the first part of the schedule thereto (being individual shareholders in the British Commercial) of the second part, and the persons named in the second part of the schedule being joint owners of shares in the British Commercial of the third part. It recited that Bermingham and Lake had agreed to purchase from the parties of the second and third parts their respective shares at 25s. per share; and by the witnessing part the parties of the second and third parts covenanted, on payment of that price for their respective shares, to transfer them to Bermingham and Lake, or their nominees; and Bermingham and Lake covenanted that they would, by themselves or their nominees, accept transfer of the shares, and would before the 1st of July, 1860, concur in all acts requisite to cause the shares purchased to be transferred out of the names of the persons in whose names they were standing into the names of some other persons, and would pay the purchase-money in manner therein mentioned. The deed contained a proviso for avoiding it if the holders of five-sixths of the shares in the British Commercial did not enter into it before the 25th of March then next.

The deed of the 8th of February, 1860, was executed, between the 10th of February and the 23d of June, 1860, by 174 shareholders of the British Commercial, holding in the aggregate 11,014 shares. Of these 174 shareholders, seven, who held in all seventy-nine shares, did not at any time execute any transfer of any of their shares in pursuance of that deed or of the amalgamation arrangement, but 167, holding in all 10,135 shares, executed between the 17th of December, 1859, and the 23d of February, \*1865, un-688 der the amalgamation arrangement, transfers of their shares in the British Commercial, either to Bermingham and Lake, or one of them, or to persons nominated for that purpose by Bermingham and Lake.

After the execution of the deed of the 8th of February, 1860, but before the 21st of April, 1865, seventeen shareholders of the British Commercial who did not execute the deed of the 8th of February, 1860, holding in the aggregate 776 shares, executed, under the amalgamation arrangement, transfers of those shares to Bermingham and Lake, or one of them, or to other persons nominated for that purpose by the British Nation.

All the transfers mentioned above were in the common form, and nearly all the transferees were officers or servants

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of the British Nation, and executed the deed of the 7th of June, 1860. This latter deed was an indenture expressed to be made between the parties executing in the schedule, including Bermingham and Lake of the first part, Bermingham and Lake of the second part, and the British Nation of the third part. This deed recited the deed of the 8th of February, 1860, and that in further pursuance of the above arrangements the persons named in the first column of the schedule had transferred their shares in the British Commercial to Bermingham and Lake, or to the other parties thereto of the first part as their nominees. The parties of the first part then declared that they would stand possessed of the shares so transferred to them in trust for the British Nation. And by the same indenture the British Nation covenanted with each of the parties of the first part that the British Nation would idemnify them, their heirs, executors, and administrators, from all liability in respect of the shares so transferred to them. This deed was not submitted to or approved by the British Nation shareholders in general None of the British Commercial shareholders who executed, under the amalgamation arrangement, transfers of their shares gave the directors any such notice of transfer as was required by the British Commercial deed of settlement, nor did any of their transferees execute such deeds of covenant as were required to be executed by purchasers of shares binding them to observe the stipulations of the deed of settlement.

Twenty-three shareholders of the British Commercial, 689] holding \*in the aggregate 210 shares, executed neither the deed of the 8th of February, 1860, nor any transfer

of their shares.

On the 30th of January, 1860, the secretary of the British Commercial issued a circular to the shareholders therein, informing them of the result of the meeting of the 21st of January, 1860, and inclosing a copy of the resolutions

passed at it.

On the 23d of March, 1860, the British Nation manager issued a circular to the British Commercial shareholders in which he appointed a day for the payment of the tirst two-fifths of the price of the British Commercial shares, and inclosed two alternative forms for signature, by one of which the shareholder signing would agree to take the price of his shares in cash, and by the other of which the shareholder signing would agree to take the price of his shares in shares of the British Nation. Fourteen British Commercial shareholders holding 1,020 shares took British

Nation shares under the amalgamation arrangement. All the British Commercial shareholders who executed, under the amalgamation arrangement, transfers of their shares, received the consideration for them according to that ar-

rangement.

After the deed of the 8th of February, 1860, the business of the British Commercial continued for some time to be carried on as a separate business, and that company issued new policies down to the 29th of May, 1862, after which day no contract was made or fresh liability incurred by it. It paid claims down to the 19th of March, 1863. After April, 1863, it had no office separate from the office of the British Nation. On the amalgamation arrangement, Lake, the manager and secretary of the British Nation, became also the manager of the British Commercial, and the secretary of the British Commercial was employed in the office of the British Nation, and attended to any matters connected with the British Commercial.

After the 1st of January, 1860, only two general meetings of the British Commercial shareholders were held, namely, on the 12th of March and the 22d of May, 1861, at the former of which new directors were appointed. The last memorial of the names of British Commercial directors enrolled under the British Commercial Act of Parliament was enrolled on the 13th of February, 1865. The company, however, was never dissolved.

\*On the 22d of December, 1864, an extraordinary [690 court of directors of the British Commercial was held, when

it was resolved:

"That the existing amalgamation of the business of this company with the business of the British Nation Life Assurance Association be adopted and confirmed, and that the trustees of this company be directed to take such steps and do such acts and execute such instruments as might be considered necessary with a view to perfecting such amalgamation and legally vesting the assets of this company in the said association."

On the 29th of December, 1864, the British Nation board of directors resolved: "That the existing amalgamation of the business of the British Commercial Insurance Company with the business of this association be adopted and confirmed, and that the deed, a copy of which has been submitted to and approved of by this board, is a proper deed for carrying the said amalgamation into effect, and that the seal of this association be accordingly affixed thereto."

These resolutions were carried into effect by a deed of the

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31st of December, 1864, indorsed—Deed of Amalgamation. By this deed the holders of 9,892 shares, which had been transferred to them as trustees for the British Nation, purported to transfer them to the British Nation, and the British Nation covenanted to indemnify the transferors from all debts in respect of the engagements of the British Commercial, subject to a proviso that only the subscribed capital of the British Nation should be liable under the covenant. This deed of amalgamation was not submitted to or approved by the British Nation shareholders in general meeting.

The transfers of British Commercial shares made under the amalgamation arrangement, and the general assignment of British Commercial shares made by the deed of the 31st of December, 1864, were from time to time entered in the share ledger of the British Commercial. The form of entry as to shares assigned by the latter deed was, "By deed dated the 31st of December, 1864, the above shares were assigned by the above named to the British Nation Life As-

surance Association, their successors and assigns."

Memorials of the names of the assignees under the last mentioned transfers and assignment were from time to time 691] enrolled \*in the Court of Chancery, the enrolments being expressed to be made pursuant to the British Commercial Act of Parliament. The last of those memorials was enrolled on the 1st of September, 1865, and gave the British Nation as the assignee of the bulk of the shares.

The British Nation went into voluntary liquidation under a resolution passed on the 18th of January, 1872; and that liquidation was by order dated the 29th of January, 1872, continued under the supervision of the court under the provisions of the Companies Acts. On the 19th of July, 1872, the British Commercial was, on the petition of a creditor, ordered to be wound up under the Companies Acts. These liquidations went on under the European Society's Arbitration Acts. The whole of the subscribed share capital of the British Nation was called up, and a further call of £4 a share was made for costs and expenses of the liquidation of that company.

In Rivington's Case it was decided that William Rivington, who was a holder at the date of the amalgamation of 200 shares in the British Commercial, and who executed the deed of the 8th of February, 1860, and a transfer of his shares thereunder to Bermingham, was not to be settled on the list of contributories of the British Commercial in respect of those 200 shares, for any purpose whatever, even as regarded liabilities of the British Commercial incurred

before he executed the transfer, or as regarded the costs of

winding up that company.

In Lawson's Case, Lord Romilly decided that Lawson, to whom, as one of the nominees of the British Nation, shares in the British Commercial had been transferred as part of the amalgamation arrangement, and who had executed a declaration of trust of those shares for the British Nation, was not a contributory of the British Commercial in respect of those shares.

In Chatteris' Case, Lord Romilly decided that Chatteris, one of the seven shareholders of the British Commercial, who executed the deed of the 8th of February, 1860, but did not execute transfers of their British Commercial shares under the amalgamation arrangement, was not a contribu-

tory of the British Commercial.

In Edwards' Case, Lord Romilly decided that Edwards, one of the twenty-three shareholders of the British Commercial, who did \*not execute the deed of the 8th of [692 February, 1860, or any transfer of their shares under the amalgamation arrangement, was not a contributory of the British Commercial.

The result of the above decisions was that none of the shareholders of the British Commercial were liable to be put on the list of contributories of that company, and that persons to whom shares had been transferred in trust for the British Nation were not contributories. Unless, therefore, the British Nation could be put on the list of contributories there was no contributory at all.

The case before the arbitrator sought to make the British Nation, and also Lawson, Chatteris, and Edwards, liable as contributories of the British Commercial, and the case as against these three persons was reheard, notwithstanding Lord Romilly's previous decisions in their favor. The arbitrator held the British Nation liable and the other respon-

dents not liable.

The arbitrator certified for an appeal, but did not give the special certificate applicable to the case of previous con-

flicting decisions.

An appeal was at the same time brought from the decisions in the cases of Chatteris, Lawson, and Edwards, although the arbitrator had not given a written certificate as required by the Arbitration Act, 1875. The appeal was heard on the 28th and 29th of January, and the 1st and 4th of February, 1878.

Bagshawe, Q.C., Cookson, Q.C., and Lemon, for the British Nation, in support of this appeal: It is made a funda-

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mental principle of the constitution of the British Nation by sect. 91 that no contracts shall be entered into on behalf of the company which impose on the shareholders unlimited liability. It is quite against this that the company should become a shareholder in another company, and indeed it is quite beyond the scope of a joint stock company to become a shareholder in another company unless authority is expressly given for that purpose. We say, then, that the deed of the 31st of December, 1864, by which it is alleged that the British Nation became legal holders of shares, is ultra vires and invalid, and that the British Nation never became a shareholder. The shares no doubt were held by trustees for the British Nation, but that does not make the \*British Nation a contributory, and it cannot be held In Peek's Case (1) there was a complete contract to take shares, and this is necessary: King's Case (1). trustee, not the cestui que trust, must be on the list: Williams' Case (3). If a man is not liable to creditors he cannot be a contributory: Bright v. Hutton (\*). The arbitrator thought that sect. 200 of the Companies Act, 1862, made a person liable to be put on the list of contributories through having agreed to take shares without putting forward his own name, and no doubt in many cases this is so; but if shares are duly vested in a trustee for A. B., that does not make A. B. a contributory. He is liable to indemnify his trustee, but that does not enable you to take the short cut of making him a contributory. None of the British Commercial shareholders can complain on the ground of the British Nation not being put on the list. They are of three classes: first, those who under the arrangement covenanted to transfer, and did transfer, to trustees for the British Na-They are released from liability. Rivington is a type Then there are those who did not covenant, of that class. but did transfer; they are free from all liability. there are those who neither covenanted to transfer nor transferred; they were strangers to the transaction, and cannot have any complaint to make. In order to make out the British Nation to be a contributory, it must be shown, 1, that it became a shareholder at law; or, 2, that it contracted to become such so as to be a shareholder in equity; or, 3, that, under the Companies Act, 1862, s. 200, it is liable to be settled as a contributory by reason of being liable at law or in equity to contribute to pay off the debts of the British Commerical. Now, did the British Nation contract to be-

<sup>(1)</sup> Law Rep., 4 Ch., 532.

<sup>(2)</sup> Law Rep., 6 Ch., 196.

<sup>(\*) 1</sup> Ch. D., 576. (\*) 8 H. L. C., 341.

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come a shareholder? One company registered under the act of 1862 can take shares in another, In re Barned's Banking Company ('), but only if authorized by its articles to do so; and here the British Nation had no such power. Its deed being completely registered, was notice to all the world. Now, clause 119, which is the only clause authorizing the taking shares of any kind, does not authorize the taking shares in a limited company. Clause 45 \*does [694] not authorize it, for taking shares is quite different from taking to a business. The deed of the 8th of February, 1860, is a deed to which the British Nation was not a party; it could not be bound by that to become a shareholder. The deed of the 7th of June, 1860, was never approved by the company in general meeting, nor does it follow from any resolution of a general meeting, it therefore cannot bind the company. The transfer was made when the Commercial Company was virtually dissolved, and is therefore void: Chappell's Case (\*); Lankester's Case (\*); Allin's Case (\*). The arbitrator seems to have been influenced by the view that a cestui que trust can be put on the list in place of the trustee by reason of his obligation to indemnify him; and Hemming v. Maddick (\*) was referred to as establishing this, but rightly understood the case goes quite the other way. The authorities are clear that the trustee must be on the list, not the cestui que trust: Chapman and Barker's Case("); Ex parte Challis(").

Sir H. Jackson, Q.C., and Whitehorne, for the European

Society, took no part in the argument.

Higgins, Q.C., and Romer, for the liquidators of the British Commercial: The claims established against the British Commercial amount to about £180,000, and if this appeal be simply allowed they will be worthless. There must be a liability to contribute somewhere. It has been decided that the transferors of the Commercial shares are not liable, nor the transferees who transferred to the British Nation, and it necessarily follows that the British Nation must be. Now, as to the objection that any contract imposing an unlimited liability on the shareholders was ultravires, we contend that it was perfectly competent to the shareholders by mutual consent to annul the clause imposing this restriction on contracts, and that the shareholders did so. At the commencement of the winding-up of the

<sup>(\*)</sup> Law Rep., 8 Ch., 105. (\*) Law Rep., 9 Eq., 175; Law Rep., 7 (\*) Law Rep., 9 Eq., 175; Law Rep., 7 (\*) Law Rep., 9 Eq., 175; Law Rep., 7

<sup>(\*)</sup> Law Rep., 6 Ch., 902. Ch., 395.
(\*) Law Rep., 6 Ch., 905 n. (\*) Law Rep., 3 Eq., 361.
(4) Law Rep., 16 Eq., 449; 6 Eng. R., (\*) 16 W. R., 451.

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Commercial the British Nation was on the publicly enrolled list of members, and had been there for years:

\*The process of this amalgamation was unique. attempt was made to produce a novation. The policyholders were not consulted. The Commercial Company was kept alive. The Bank of London Case (') has no applica-The amalgamation in our case, as it was effected, was quite intra vires. In the Albert Case the clause limiting the powers of the company to alter the rules was stronger than in our case. There was no power to amalgamate at all: the British Nation deed gives power to amalgamate. But in truth no power is necessary. There is nothing that a general meeting cannot alter if all the shareholders con-Even if limited liability be a fundamental principle of the company, the shareholders may consent to alter it. If all the shareholders can alter the laws as they please, a majority may do so, if the minority acquiesce. If the minority protest, it may be different; but if they acquiesce, they must be taken as consenting. Our positions are—1. At the commencement of the winding-up of the Commercial in 1872, the Nation was on the list of shareholders, and had been there for seven or eight years, and their name was put on by their own consent, without any intervention of the Commercial, by which the creditors of the Commercial cannot be prejudiced. 2. The onus is on the British Nation to have its name removed from the list of members, and it cannot now get the register rectified. Even if there were no formal difficulty, it has no equity to do so. The appellants say, first, that the British Nation had no power to take shares, and, secondly, that it did not take any. We say that it had power to take, and did take, shares. 3. We rely on the effect of the 200th section. There was a contract to take shares, and the company became equitable share-4. We rely on the authorities as to the effect of acquiescence. Assuming that there was an informality, the acts of the British Nation render it impossible for them to take advantage of it. As to the first and second propositions, Oakes v. Turquand (\*) shows that there are many cases where persons who are on the register at the time of the winding-up cannot get their names taken off, although they might have done so before the winding-up. nothing in the nature of a company which in itself prevents it from holding shares in another company. The act of 696] 1862 \*assumes that it may be done: In re Barned's

<sup>(1)</sup> Albert Arb., Part I, App. B.

<sup>(2)</sup> Law Rep., 2 H. L., 325.

Banking Company ('); Royal Bank of India's Case ('). It is not for us to show a special power in the articles of the British Nation to take shares, provided it is in accordance with the general objects of the company; and even if there was anything against it in the articles of the company, a general meeting had power to alter it, and did alter Power is given by clauses 44 and 45. Clause 91, which says that the liability is to be limited in all contracts, only applies to acts done by the directors, and the reservation in clause 44 means that no alteration may be made which shall give power to the directors to pledge the unlimited liability of the shareholders, but a general meeting had power to do what has been done: Greenwood's Case (\*); Agar v. Athenœum Assurance Society (\*); Prince of Wales Assurance Society v. Athenœum Assurance Society (\*); Ernest v. Nicholls (\*). This was an unregistered company, and therefore the constitution could be altered with the consent of all the shareholders, express or implied: Lindley on Partnership ('); Webb v. Herne Bay Commissioners ('); Lane's Case (\*).

3. As to the effect of sect. 200 of the Companies Act, 1862, there was a bargain between the two companies that the Commercial shares should be bought up on behalf of the Nation; that the Nation should be liable for the debts of the Commercial, and that the Nation should take the shares and should indemnify the trustees. The Nation Company was therefore the real owner of the shares, and a contributory of the Commercial Company under sect. 200: Wil-

liams' Case (1°).

4. As to the acquiescence of the shareholders of the British Nation, we say that the shareholders confirmed the transaction, even if it was ultra vires: Re Era Company ("); Evans v. Smallcombe ("); Phosphate of Lime Company v. Green (13). The court will not interfere to stop acts which are ultra vires, if there has been acquiescence on the part of the body of the shareholders, \*unless [697] they are contrary to the fundamental purposes of the company: Anglo-Australian Assurance Company v. British Provident Life Assurance Society ("). In this case the British Nation Company has enjoyed the benefit of the

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(1) Law Rep., 8 Ch., 105.
(*) Law Rep., 4 Ch., 252.
(*) 3 D. M. & G., 459.
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<sup>(4) 3</sup> C. B. (N.S.), 725. (5) 3 C. B. (N.S.), 756 n.

<sup>(6) 6</sup> H. L. C., 401. (¹) Vol. i, p. 263.

<sup>(8)</sup> Law Rep., 5 Q. B., 642. (9) 1 D. J. & S., 504. (10) Law Rep., 9 Eq., 225 n. (11) 1 H. & M., 672. (12) Law Rep., 3 H. L., 249. (13) Law Rep., 7 C. P., 43; 1 Eng. R., 98. (14) 3 Giff 591 A. D. F. & J. 341. (14) 3 Giff., 521; 4 D. F. & J., 341.

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They have taken all the premiums since 1860: agreement. Re Phanix Life Assurance Company ('); Re Sea, Fire and Life Assurance Company ('). A third party is not bound to examine into the question whether a company has observed all the conditions imposed by its articles: Royal British Bank v. Turquand (\*). Sect. 47 gives power to purchase on such terms as the directors think fit.

[JAMES, L.J.: That would not authorize anything which

in substance altered the constitution of the company.]

Taking shares must have been contemplated, for in no

other way could the business be acquired.

[JAMES, L.J.: Buying shares is quite a different thing The shares are not the property from buying a business.

of the selling company.]

The power was created before the Companies Acts, and must be taken to authorize the acquiring the business of a private partnership, which could only be acquired by transfer of the shares of the partners.

JAMES, L.J.: No. The partners together would convey

the entire property.]

There is power to invest in the purchase of personal property.

[JAMES, L.J.: How could such a power authorize becom-

ing a partner in a business?

The provision as to limited liability is merely a regulation for the shareholders inter se, and does not affect third parties: Greenwood's Case ('). Where there is a direct contract between the company whose shares are held and the beneficiary, the beneficiary is the person responsible: Reaveley's Case (').

On the appeals in the cases of Chatteris, Lawson, and Ed-

wards, being opened,

\*Hemming, Q.C., and Millar, for Chatteris, took a preliminary objection: The decision in Chatteris' Case was made by Lord Romilly under the European Arbitration Act of 1872. By the 16th section of that act, after directing how applications are to be made to the arbitrator, it was enacted "that the opinion or decision of the arbitrator on any such application, or with respect to the costs thereof, or on any matter or thing within his jurisdiction, shall not be subject to any review or appeal." Then the European Arbitration Amendment Act, 1875,

<sup>(1) 2</sup> J. & H., 441. (2) 5 D. M. & G., 465. (3) 6 E. & B., 327.

<sup>4) 8</sup> D. M. & G., 459.

<sup>(5) 1</sup> De G. & Sm., 550.

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sect. 3, provides that the Court of Appeal in Chancery shall have jurisdiction and power to entertain an appeal from any determination or order of the arbitrator given or made before or after the passing of this act. And then it goes on to enact that, "An appeal shall lie from any determination or order of the arbitrator accordingly, subject to the foregoing provisions (among others):

"(1) As regards any determination or order given or made before the passing of this act, an appeal shall not lie therefrom unless the arbitrator expressly certifies in writing that by reason of differences between previous decisions on matters of principle relating to cases of novation or of liability of contributories, it is desirable that an appeal

be brought."

In the present case, Mr. Reilly, the present arbitrator, has not given any certificate that it is desirable that there should be an appeal. The court, therefore, has no jurisdiction to hear the appeal. The fact that the arbitrator has made these persons respondents to the special case is not sufficient without a formal certificate.

Bevir, Q.C., and Bissell, for Lawson, and J. Pearson, Q.C., and Millar, for Edwards, took similar objections.

Higgins, Q.C., and Romer, for the appellants: respondents are not in the same position as if a final award had been made before the passing of the act of 1875. Although Lord Romilly had given his decision upon their cases, it was open to him or his successor to reconsider those decisions at any time before the final award. That was the view that Lord \*Cairns took in the Albert Arbitra- [699 And Lord Romilly, in this arbitration, reheard a case which had been decided by Lord Westbury. The words "previous decisions" mean decisions before the appeal is brought, not necessarily before the passing of the act of And there cannot be a doubt that, in the words of this act, there have been "differences between previous decisions on matters of principle" relating to the questions now before the court. If, therefore, the arbitrator has not given a certificate, it is only the omission of a form, which we could get rectified. But, in fact, the form of the special case to which these respondents are made parties, and in which the judgment of the Court of Appeal is asked, "What other decision should be given either as between the appellants and respondents, or any of them, or as among the several respondents," amounts in itself to a certificate that the appeal in the case of these respondents is desirable.

JAMES, L.J.: The absence of the certificate is to Feb. 1, my mind conclusive. The arbitrator has not given the certificate required by the act of Parliament. We have heard a very long argument to show that if he had not given the certificate in words he had done so in effect, and that he meant to say there had been that difference of opinion. at present advised, I see no ground for that contention. think it right to say that the 16th section of the first act of Parliament is one to which effect must be given according to its plain meaning. Nobody can doubt that that 16th section says that application shall be made to the arbitrator in such manner and form, and shall be heard and disposed of as the arbitrator shall direct, and every decision of the arbitrator upon any such application, shall not be subject to review or appeal. Then Messrs. Chatteris, Lawson, and Edwards say: "We have a decision by the arbitrator in our favor, and that decision was by the act of Parliament made final." The further clause in the Amendment Act, which has been relied upon, must be construed very strictly in favor of the gentlemen who rely on the 16th section of the old act. The Amendment Act, after a recital that, in some cases of great importance as affecting the liquidations 700] of \*the companies subject to the arbitration, the second arbitrator had differed in opinion from and varied the determinations and orders of the first arbitrator, and difficulty had ensued therefrom in the conduct of the administrative business of the arbitration, contains a clause that, in certain cases, an appeal shall lie from any determination or order of the arbitrator, subject to the following provisions, the first being: "As regards any determination or order given or made before the passing of this act an appeal shall not lie therefrom, unless the arbitrator expressly certifies in writing that by reason of differences between previous decisions on matters of principle relating to cases of novation or of liability of contributories it is desirable that an appeal be brought." Now, the meaning of these words "between previous decisions" must be decisions previously acted upon. I think, therefore, that the arbitrator purposely abstained from giving a certificate.

BAGGALLAY, L.J.: I am of the same opinion. We are bound to come to a decision on the objections raised on behalf of these gentlemen to the hearing of an application in the nature of an appeal against the former decisions in this case, and as far as they are concerned we are bound to deal with that objection irrespective of any inconveniences that may be occasioned to other parties by reason of the mode

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in which we deal with it. Each of these three gentlemen has had a determination in his favor by one of the previous arbitrators. At the time when those determinations were arrived at, an act of Parliament was in force which declared that they should be final and conclusive, and not open to review or appeal, and before the act of 1875 was passed, these gentlemen were entitled to rely upon these determinations as being final and conclusive. When the act of 1875 was passed, it recited, as was the fact, that in the course of the liquidations of these companies by the two preceding arbitrators there had been differences of opinion on matters of principle, and it went on to recite, that, though there was an imperative provision in the former act of Parliament that their decisions should be without appeal, it was proper that in certain cases there should be a power of appeal, but the enacting \*part limits the right of appeal, as far [70] as regards any determination or order given or made before the passing of the act of 1875, to cases in which the arbitrator expressly certifies in writing that it is desirable that an appeal should be brought by reason of differences between the previous decisions. No language could be more clear, having regard to the previous recital, though I should have thought it sufficiently clear without it, to express that the conflict of principle must have been in connection with some determination or order arrived at before the act of 1875 was passed. It would be convenient, no doubt-I do not mean to say that the arbitrator is bound to do so, but it would be convenient-if he did expressly certify, in each particular case, that by reason of such differences in principle an appeal should be brought, and that he should specify himself, on the certificate, what those differences in principle are on which he thinks it desirable that there should be an appeal. However, I say no more on that. With regard to its being desirable that such an appeal should be brought, I feel quite clear that we are bound to have, on his responsibility, a distinct statement in writing that he considers there is a proper case for appeal. We have here no such clear case and no such certificate. Now, it has been suggested that though the certificate does not exist, there may be the means and the opportunity of procuring I am far from saying that in no possible case would this court give the opportunity for a certificate being obtained after the appeal was lodged, but it must certainly be an extreme case to justify it. At the present moment I see no reason for giving that leave, or allowing the matter to stand over in order that such certificate should be obtained,

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far as I am able to trace the decisions arrived at by Lord Westbury in *Rivington's Case*, and Lord Romilly in the cases which are represented before us to-day, I can see no difference in matter of principle. It is possible, and it may be so urged, that a principle applied in an earlier case was applied also in a later to which it was not properly applicable, but that is not a difference in principle. It may be at the outside an error of judgment as regards the application of a recognized principle. I think, therefore, that the objections that are taken on behalf of Messrs. Edwards, Chat-

teris, and Lawson, are well founded.

\*THESIGER, L.J.: I am also of opinion that the 7021 preliminary objection that is taken is well founded. ground my judgment on the absence of the certificate by the arbitrator. At the same time I may say that nothing which I have heard has satisfied me that there has been any difference of principle between the decisions of Lord Romilly and Lord Westbury on the point which we have to deal Also, I am not satisfied that there has been any difference between the decision of Mr. Reilly, in point of principle, and the previous decisions of Lord Romilly and Lord Westbury. And, although I was very much struck with the ingenuity of the argument of Mr. Romer, founded on the meaning of the words "between previous decisions," I am not satisfied that, even if we were to give any decisions which were contrary to the previous decisions of Lord Romilly and Lord Westbury, that that would enable those decisions, given, as they were, before the passing of the act, to be reviewed on appeal, even if a certificate were given.

On the appeal of the British Nation their Lordships re-

served their judgment.

Feb. 26. JAMES, L.J., now delivered the judgment of the

Court (James, Baggallay, and Thesiger, L.JJ.):

The circumstances under which this appeal has been brought, and the facts on which it has to be decided, are sufficiently stated on the special case, settled by the arbi-

trator, and the appendix thereto.

In some respects, by reason of the decisions of former arbitrators, the question has assumed a very peculiar aspect. The question immediately before us is whether the British Nation Association, in its quasi corporate character, is or is not liable to be placed on the list of contributories of the British Commercial Company. That company, at the commencement of the transactions out of which this question has arisen, consisted of 174 shareholders, holding 11,014

shares, seventeen other shareholders holding 776 shares, and twenty-three other shareholders holding 210 shares. The differences in the position of these several classes of shareholders \*appear in the special case. By decisions in [703 the arbitration all these several persons were declared not to be liable as contributories.

In the course of the transactions 184 shareholders executed transfers of, in the aggregate, 11,711 shares to persons who were directors, officers, servants, or other nominees of the British Nation as its trustees, and by a deed, dated the 31st of December, 1864, shares, amounting in the aggregate to 9,892, were expressed to be assigned to the British Nation itself by the persons to whom they had previously been transferred as such trustees.

In Lawson's Case it was decided by Lord Romilly, as arbitrator, that such last mentioned persons were not liable to be put on the list of contributories. And it was contended before us that it followed logically from those decisions that the British Nation was, as the ultimate transferee, the shareholder in respect of those shares. The original shareholders were, it is said, exonerated by reason of their having got rid of their shares, and the intermediate transferees were in like manner exonerated by reason of their having transferred their shares to the British Nation. Either, therefore, it was urged, the previous decisions, or one of them, were or was wrong, or the British Nation must be liable as transferee. And in this view of the case the persons who had obtained the decisions in their favor were made respondents to this appeal with the view, if possible, of having the whole matter determined by this court as to who ought to have been, and who ought to be, placed on the list of contributories. But it was contended by such respondents, and we decided, that under the acts regulating the arbitration no such appeal was competent, and that the decision in their favor was And, on the other hand, it was conabsolute and final. tended by the shareholders of the British Nation that they were no parties to the previous decisions, that there was, so far as they were concerned, no res judicata, and that they were entitled to have their case decided wholly unprejudiced by the former decisions. This contention is, we think, not to be gainsayed. Their argument on the merits may be very shortly stated. The deed by which their officers and trustees affected to divest themselves of their shares, and to vest them in the association, is, they say, ultra vires and void.

\*The association was formed for the purposes mentioned in article 3 of their deed of settlement, such purposes In re European Society Arbitration Acts.

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to be carried into effect and the business to be managed by boards of directors and by general meetings in manner there prescribed. Prima facie there is nothing more inconsistent with the whole scope and character of such a body than that it should enter into a contract of partnership with any other person or persons in any other business whatever. It would require very clear powers to enable a man's partner or partners, or, in a joint stock company, his delegated officers, or the majority of his co-shareholders, to make him a partner with any other person or a shareholder in any other society. But if the society, in its quasi corporate character, could take shares in another partnership or body, it would in effect be to make every shareholder a partner or shareholder in such partnership or body. In the deed of settlement in this case there is express power to invest the funds of the society not immediately required in shares. But the language of that clause goes far to negative any such power to invest generally in shares or in a partnership. It is only as an investment of surplus funds that it is permitted to purchase shares, and shares only in docks, &c., things that are mentioned in the articles, established by act of Parliament, in substance, interests in real estate; nothing, in fact, like a partnership in some other business speculation or adventure. It was put to counsel in the course of the argument whether it could possibly be contended that such a society as this could take shares, or become a partner in a society or partnership for brewing or mining, or buying and selling of merchandise, and it was admitted that it would be difficult so to contend. But in truth, the more or less similarity of the objects, or even absolute identity of the objects, does not affect the principle. It is the entering into a new contract of partnership with new persons under a new constitution, which is absolutely ultra vires and void, unless specially provided for and authorized.

But it is suggested that there is such special provision and authority in this case. By the 45th article of the deed of settlement it is provided, "that an extraordinary general meeting may accept or take a transfer of or purchase or acquire the business of any other associations, companies, or 705] societies of a similar nature \*wholly or in part with the association hereby established, upon and under such terms, conditions, stipulations, and agreements as such

meeting shall think fit."

It is said that it was, and in truth it appears to have been, competent for the society to purchase the business of the Commercial, and that it was a proper term and condition of

the purchase of an entire business, that the purchasing company should take the shares of the selling company. would probably be sufficient to say that it was not one of the terms and conditions of the agreement that the association should take, itself, a transfer of the shares.

Neither the selling company nor the buying company nor the transferring shareholders contemplated such a mode of dealing with the matter. The latter, probably, would have been advised to have nothing to do with such an attempt. What was done was to find individual transferees capable clearly of accepting and holding the shares. And the latter were the officers and managers of the society and their friends, who were anxious to promote the scheme, and were willing to take what they probably then thought an inappreciable risk, having the indemnity of their own association. That was the transaction as it was arranged, and as it was carried out.

But it must be held, we think, that the power to take a transfer of or to purchase a business on such terms, conditions, stipulations, and agreements as the meeting should think fit, could not, under the guise of a condition or stipulation, sanction every dealing and transaction that it might be thought fit to enter into contemporaneously with it. could not under that guise sanction something so entirely at variance with the whole constitution and principle of the association as to make those shareholders who had carefully limited their liability so far as they could do it to £10 per share, shareholders in another society with a liability to £50 a share. By their constitution it was stipulated that every document binding them shall contain certain express reference to the provision making the funds and property and subscribed capital of the society alone liable, and declaring that the shareholders should only be in fact liable to pay calls on their subscribed capital. Even the power given to two successive general meetings to \*amend the laws [706] was carefully guarded so as not to extend to any alteration enlarging the individual responsibility of the shareholders. And it would be against all reason to hold that a general meeting purchasing a business from another society should have the power to accept, either in terms, or by implication, a condition or stipulation that in respect of such purchased business the shareholders should be liable to a totally different extent, and on a totally different principle, from the liability under which they stood on business of the same kind originally entered by their own officers. If such a con-

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dition were expressed in terms it would at once shock the mind of any person to whom it was submitted.

The transaction as it was carried out was reasonable enough. The purchasing company was to the whole extent of its funds and property liable to discharge the liabilities of the selling company, just as it was liable to satisfy its own similar contracts, and there being no novation, the mode in which it assumed that liability was by giving an indemnity to the selling company and its shareholders.

As part of the same indemnity, it became liable to save harmless its own nominees who took transfers of shares in order to facilitate the purchase. But that was only the same liability in another form, namely, the liability to discharge the contracts connected with the transferred business out of the same funds, property and capital, out of which all their That was how things other contracts were to be satisfied. stood when the deed of 1864 was made, and when it was attempted thereby to vest the shares in the association itself. Where was there any authority for that deed? pressed object of the deed was in fact not to vest the shares. qua existing and continuing shares in the association, but to merge and extinguish the shares, and it is not unworthy or notice that in that very deed the covenant to indemnify such transferring shareholders is expressly limited to the funds and property of the association. It is beyond all question that the trustees, directors, and managers of the association could not by their own act, by means merely of their own physical possession of the common seal, alter their The deed of 1864 position towards their cestuis que trust. was an entirely internal matter. Before the execution of 707] that \*deed the shareholders, parties thereto, were liable as such, with an indemnity out of the funds. They had no power, as between them and the association, to transfer their own liability to the latter. And no other person or body of persons could be prejudiced or benefited or affected by an instrument to which they were absolutely strangers, such instrument being void as between the parties to it.

It was argued, however, that this transaction became binding by reason of the entry of the association as owners of the shares in the books of the Commercial, and by the enrolment in chancery of a memorial of the assignment to the association and the acquiescence of the British Nation shareholders therein. It was said that this was like *Peek's Case* ('), that the British Nation were at the time of winding-up de facto the shareholders, and that, whatever equity they

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might have had before the winding-up to be relieved from their shares, they could not, after the winding-up, assert such equity.

That case, however, has no application if the preceding reasoning is sound; this is not the case of a person induced to become a shareholder, and who had become a shareholder by fraud—but of persons who say truly they never were shareholders.

They never accepted their shares, and if that be so, the entries in the books of the company and the enrolment of the memorial in chancery were wholly inoperative as to them.

Such entries and memorial are as void as the transaction itself. It is not unimportant to observe that the entries in the books are without date; and that the memorial was not enrolled until the 1st of September, 1865, several months after both the Commercial and the British Nation had practically ceased to exist, the latter having on the 16th of March, 1865, become amalgamated with, and merged in, the European.

And with regard to the alleged acquiescence there are no facts from which any such acquiescence can be inferred. It is found in the case that the deed of 1864 was not submitted to any general meeting, and it is not found, and does not appear, that it was in any other manner made known to the shareholders generally, or that anything was ever done by any one on the faith of or in reliance \*on such deed, [708] or in consequence of it, except the above mentioned entries and memorial which have been already dealt with.

But it is lastly contended that the British Nation became equitably liable as contributories. It is said that, under the 200th section of the act of 1862, all persons legally or equitably liable to contribute to the assets are contributories, and may be put on the list as such. It is impossible to hold that any person who is a debtor to the company in liquidation can be put on the list of contributories. He is bound to pay moneys, which moneys, when paid, will be part of the assets of the company, and in that sense he is liable to contribute to the assets, but that does not make him a contributory within the meaning of the act. Again, a person who has taken shares in the name of a trustee is, as between him and his own trustee, the person liable to contribute, but that does not make him a contributory as between him and the The company may get at him, as it has in several instances, through and in the name of the trustees. But still the equitable liability is to the trustee only, and there is no privity or direct right of any kind as between the In re European Society Arbitration Acts.

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company and the cestui que trust. If an officer of the company has misappropriated assets, he may be made to refund them to the liquidator as part of the assets, but that does not make him a contributory. The plain meaning of the act is a legal or equitable liability to contribute in the character of a partner. A person who has not taken shares may have become bound in equity to the company to take shares. A person who has by some device or contrivance got rid of his shares may be made to take them again. These are instances of the equitable liability to which the act refers.

But if the British Nation did not become actual legal shareholder, it never became under any equitable obligation to the Commercial to take shares. It never dealt with the Commercial at all in its quasi corporate character in respect of the shares. The shares were dealt with by the individual owners of the shares, who alone had a right so to deal.

There was, however, a very substantial equity as between the two companies arising out of the transaction itself. As between the selling company and the purchasing company, the latter became primarily liable to fulfil the contracts of the 709] former, which \*has a right to enforce such liability. But as between two such bodies, each of which must be taken to have known the constitution of the other, and indeed without such knowledge, the equitable liability could not extend beyond the legal liability which it would have been intra vires to give by express covenant, namely, a liability to fulfil such contracts pari passu with its other contracts and out of the same funds.

And that liability has, we are told, been actually so dealt with in the winding-up, that is to say, the policies and other obligations of the Commercial have been let in to participate pari passu in the distribution of the assets of the British Nation.

The result will be to allow the appeal and discharge the order of the arbitrator putting the British Nation on the list of contributories of the British Commercial.

The arbitrator will deal with the costs of the appeal as he has done in other cases.

Solicitors: John Tucker; Mercer & Mercer; Wilkins, Blyth & Fanshawe; Carr, Bannister & Co.; G. L. P. Eyre & Co.

Governors of Magdalen Hospital v. Knotts.

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## [8 Chancery Division, 709.]

Fry, J., Nov. 13, 1877: C.A., March 26, 29; April 16, 1878.

## GOVENORS OF MAGDALEN HOSPITAL V. KNOTTS.

[1876 M. 243.]

Charity—Voidable Lease—18 Eliz. c. 10, s. 3—Eleemosynary Corporation—Statute of Limitations—Presumption of Possession under Rightful Title—Counterpart of Lease—Evidence.

In the year 1783 the Governors of Magdalen Hospital, a charitable society incorporated in 1768, granted a lease of property belonging to the hospital for ninety-nine years to a lessee at a peppercorn rent. In 1876 the governors of the hospital brought an action against the defendants, who were then in possession of the land, asking for a declaration that the lease was void under the 13 Eliz. c. 10, s. 3, and to be put into possession of the property. No proof was given by the plaintiffs that the defendants claimed their title to the land under the lease:

Held (affirming the decision of Fry, J.), that the counterpart of the lease produced by the plaintiffs was evidence against the defendants of the execution of the lease, and that the plaintiffs were owners of the freehold of the land; and that in the absence of proof that the defendants claimed under \*any other title, there was [710 a presumption that their title was derived under the lease.

Held, also, that the hospital, although an eleemosynary and not an ecclesiastical corporation, was within the statute 13 Eliz. c. 10, and that the lease was voidable under the 3d section:

But held, that the right of action to recover possession of the land accrued to the governers of the hospital at the date of the execution of the lease, and that the action was now barred by the Statute of Limitations.

Governors of Magdalen Hospital v. Knotts (on demurrer) (1) reversed.

The plaintiffs in this action were a charitable corporation, founded in the year 1758 as a voluntary charitable society for establishing a house for the reception, maintenance, and employment of penitent prostitutes, and incorporated by an act 9 Geo. 3, c. 31 (the Magdalen Hospital Act, 1768), under the name of The President, Vice-Presidents, Treasurer, and Governors of the Magdalen Hospital for the Reception of Penitent Prostitutes. The action was brought to recover possession of a house and premises known as The Tower public house, situate in Tower Street, Westminster Bridge Road, in the county of Surrey, and in the possession or occupation of the defendants, on the ground that a lease of the property for ninty-nine years, executed in 1783 by the corporation to one Charles Gilbert (through whom it was alleged that the defendants derived title) was void under the act 13 Eliz. c. 10, s. 3. The action was commenced on the 11th of July, 1876, with the sanction of the Charity Commissioners, against the defendant Knotts, the tenant in occupation of the public house. On the 26th of July, 1876,

(1) 5 Ch. D., 175; 22 Eng. R., 14.

the defendants, R. M. Shaw, T. J. Shaw, and Sarah Shaw, who claimed to be the landlords of the public house, obtained leave to appear and defend the action, and on the 3d of August, 1876, the defendant James Watney, a member of the firm of Watney & Co., brewers, who claimed to be mortgagees of the defendant Knotts' interest in the property, also obtained leave to appear and defend the action.

The facts, as alleged in the statement of claim, were as

follows :-

By an indenture of release, grounded on a lease for a year, dated the 21st of November, 1763, certain pieces of land were conveyed by Thomas Clarke to Robert Dingley and Philip Milloway in fee. The land thus conveyed was described in the \*release as three pieces of pasture ground lying in the open and common fields, called St. George's Fields, in the parish of St. George the Martyr, in the county of Surrey, and containing by estimation six acres, but lying separate, and divided in three portions of three acres, two acres, and one acre. In a plan annexed to the deed, the larger plot of the three was stated to contain 3A. The land sought to be recovered in the action was part of the plot of two acres. Upon the release was indorsed a memorandum, dated the 6th of April, 1769, under the hands and seals of Dingley and Milloway, declaring that the lands therein comprised were purchased by them for the use and benefit of the corporation, and that their names were only used in the deed in trust for the corporation.

The act of 1768, which incorporated the charity, recited the seisin of Dingley and Milloway on trust for the charity, and that four acres, part of the six acres, whereon it was intended to build the hospital, lay together in one plot, but that the said four acres could not be inclosed for that purpose unless certain rights of common thereupon were extinguished. And it was enacted that from and after the passing of the act all rights of common in, over, or upon the said four acres of land lying together in one plot should be

extinguished.

The plaintiffs had not in their possession any conveyance of the legal estate in the hereditaments which at the date of the act were vested in Dingley and Milloway, but the plaintiffs had (as thereinafter appeared) for many years acted as the legal owners of the hereditaments, and they submitted that at this distance of time a conveyance of the legal estate ought to be presumed. Soon after the passing of the act a building for the purposes of the hospital was erected on the part of the land called in the act four acres (which land in

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reality contained 3A. 9P.), and this building was until the

year 1869 used for the purposes of the hospital.

By a lease dated the 4th of December, 1783, Charles Gilbert demised to the plaintiffs' corporation, their successors and assigns, a piece of land in St. George's Fields adjoining the land of the hospital for the term of fourteen years from the 25th of March, 1783, at the yearly rent of of £5.

\*By another lease, also dated the 4th of December, 1783, which on its face purported to be made in consideration of the rent, covenants, and agreements thereinafter reserved and contained on the part of Charles Gilbert, his executors, administrators, and assigns, the plaintiff corporation demised to Gilbert "All those pieces or parcels of ground belonging to the said president, vice-presidents, treasurer, and governors, situate, lying and being dispersedly in St. George's Fields, in the parish of St. George the Martyr, in the said county of Surrey, not included within the site or wall of the present hospital, or the gardens or yards thereof belonging, together with, &c., as the same premises are now and have been for several years past in the tenure and occupation of the said Charles Gilbert," to hold the same from the date thereof for the term of ninetynine years at the yearly rent of one peppercorn, if lawfully demanded. And Gilbert covenanted that he, his executors, administrators, and assigns, would from time to time, and at all times during the term, indemnify and keep harmless the lessors of and from all rates, taxes, duties, and assessments to be imposed on the said demised premises by act of Parliament, or otherwise howsoever, and from all costs and charges relating thereto. Gilbert also covenanted to yield up the premises at the end or sooner determination of the term. These were the only covenants on the part of the There was a covenant by the lessors for quiet en-The site of The Tower public house was included joyment. in this lease.

In 1794 the corporation demised to the assignees of Gilbert, who had become bankrupt in 1793, the same premises for a reversionary lease of fifty years, "to commence and be completed from and at the end of the said term of ninetynine years, by the way of adding fifty years to the said term of ninety-nine years, and to be held at a peppercorn rent; and in 1795 Gilbert and his assignees demised to the corporation a piece of leasehold land for fifteen years and a half at a peppercorn rent, both the last mentioned demises

being recited to be made in pursuance of an agreement to that effect in 1793.

The plaintiffs alleged that the defendants claimed under a derivative title from Gilbert and his assignees, the defendant Knotts being the tenant in possession. Down to the 713] issue of the \*writ in this action no act had been done by the plaintiffs to avoid either of the leases. The plaintiffs claimed a declaration that the two leases were void under the act 13 Eliz. c. 10, s. 3, so far as they affected The Tower public house; possession of the house and premises; £105 for mesne profits from the date of the issue of the writ to the day of recovering possession; and further relief.

The defendants demurred to the statement of claim on the ground that the plaintiffs' right was barred by the Statute The Master of the Rolls overruled the deof Limitations. murrer ('), holding that the statute of Elizabeth operated to make the lease only voidable, and not void, and that the Statute of Limitations did not, therefore, begin to run until the plaintiffs had taken some step to avoid the lease of 1783, i.e., not till the issue of the writ in the action.

The defendant Knotts, by his statement of defence, said that he was in possession of the property sought to be recovered, as tenant of the defendants the Shaws, and he denied the several allegations of fact contained in the statement of claim. He also pleaded that the plaintiffs' claim had been barred by the Statutes of Limitation.

The defendants the Shaws, by their statement of defence, denied the allegations contained in the statement of claim, and in particular they denied that Gilbert entered under the alleged ninety-nine years' lease on the lands alleged to be comprised in that lease. They also denied that either Gilbert or persons claiming under him had been in possession of the said lands under the said lease to the present time. The defendants said that they were in possession of the premises sought to be recovered by their tenant, the defendant Knotts, and that they relied upon the Statute of Limitations; and they submitted they were not bound to set forth the title under which they claimed to be entitled to the premises sought to be recovered. They also said that they had been in possession of the premises for many years as purchasers for value without notice of the plaintiffs' title. and that the defendants and their predecessors in title had expended large sums in erecting buildings thereon and otherwise improving the same.

714] \*The defendant Watney, by his statement of de-(1) 5 Ch. D., 175; 22 Eng. Rep., 14.

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· fence, said that he was in possession of the land sought to be recovered by his tenant the defendant Knotts, within the meaning of the Rules of Court, 1875, Order XII, rule 18, and Order XIX, rule 15. He did not admit the allegations in the statement of claim, but put the plaintiffs to prove them strictly. He pleaded the Statute of Limitations, and also said that he was a purchaser for value without notice of the plaintiffs' right.

After the statements of defence had been delivered, the plaintiffs amended their statement of claim by adding an allegation that "the defendants have never claimed, and do not by their statement of defence in this action claim or set up any title paramount to the title of the plaintiffs or any title other than such derivative title as aforesaid."

The action came on for trial before Mr. Justice Fry on

the 13th of November, 1877.

Cookson, Q.C., and Decimus Sturges, for the plaintiffs: The principal legal questions have been already decided by the Master of the Rolls upon the demurrer.

FRY, J.: I shall feel myself bound by that decision. The only question, therefore, is whether the plaintiffs can

prove their case.

The defendants say, in effect, that we must prove that the public house was comprised in the lease to Gilbert, and that the defendants are in possession of it through him. the defendants being in possession, and showing no title inconsistent with the supposition that they are in possession under the lease to Gilbert, the court will presume that they are in possession under that lease by a rightful title rather than as mere squatters: Doe v. Williams ('). A tenant cannot by any act of his own alter the relation in which he stands to his landlord: Archbold v. Scully (\*).

It is only a lease voidable at the lessor's election. in Chadwick v. Broadwood (\*), the tenant had paid his rent to a wrong person, the Statute of Limitations might operate, but here \*no rent has been paid at all. The counterpart of the lease will be evidence of the lease: Doe v.

Pulman (`).

It was then proved by Mr. Currey, the plaintiffs' surveyor, that, assuming the execution of the lease of 1783, and assuming also that the Governors of the Hospital were at the date of the lease of 1783 still seised of all the lands which were conveyed to them by the deed of 1763, the property of which the defendants were in possession formed part of the

<sup>(1) 6</sup> B. & C., 41. (2) 9 H. L. C., 860.

<sup>(8) 3</sup> Beav, 308. (4) 3 Q. B., 622.

land comprised in the deed of 1763, and also part of that which was comprised in the lease of 1783. Mr. Currey also proved that the land on which the hospital was built was that which was described in the deed of 1763 as containing three acres, and in the plan to that deed as containing 3A. 9P.

The counterpart of the lease of 1783 was then tendered as

evidence of the lease.

North, Q.C., and Warmington, for the defendants the Shaws and Knotts: The counterpart is not evidence against It has not yet been proved that the land of which we are in possession was comprised in the lease. There is no legal presumption that the governors continued the owners of the land conveyed to them in 1763 up to the date of the execution of the lease of 1783. But, if there be such a presumption, it is rebutted in this case. The deed of 1763 describes the land thereby conveyed as consisting of three plots containing respectively three acres, two acres, and one acre, and the plan annexed to the deed shows the larger plot as containing 3A. 9P. The act of Parliament of 1768 says that the land of which the trustees for the charity were then seised consisted of two plots containing four acres and The inference from this is that the charity land was not then the same as that which was conveyed by the deed of 1763. This view is confirmed by the statement in paragraph 7 of the statement of claim, that the plaintiffs have not in their possession any conveyance of the legal estate in the land which was vested in Dingley and Milloway as trustees for the hospital.

716] \*FRY, J.: Mr. North, objects to the counterpart of the lease of 1783 being put in as evidence against him. He says that it is the only evidence of the identity of the premises which he claims and of the allegation that he is now in possession of property which is comprised in that

lease.

He says that there is no presumption that the Hospital remained in 1783 the owners of the lands which were conveyed to them in 1763. Now upon that general question I determine against him. I hold that when there is evidence that land is conveyed to a particular person, there is, in the absence of anything to the contrary, a presumption that the land remained the property of the person to whom it was so conveyed. I hold that, in the absence of something to the contrary, the lands conveyed in 1763 must be presumed to have been still the lands of the hospital in 1783.

Then Mr. North says that that presumption is in the present case rebutted, and he says it is rebutted by two circum-

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stances, the first being the act of Parliament. The deed of 1763 described the three parcels of land conveyed to the hospital trustees as containing respectively three acres, two acres, and one acre. The act of Parliament recites the seisin of the same trustees of six acres of land, but it speaks of one piece of land as containing four acres, and the other two pieces as containing together two acres. Mr. North says that from that I ought to infer, at any rate, that the two pieces, which before had contained three acres, had then been diminished to two acres. If that were all, I do not think that I ought to make that inference. I think that I should be bound to hold, on the mere construction of the act of Parliament and the deed of 1763, that the piece of land which is described in the deed of 1763, as containing three acres, or, as appears upon the plan, 3A. 9P., was the same piece of land as that which is described in the act as containing four acres.

But the matter does not stop there, because the evidence of Mr. Currey identifies the parcel which is described as 3A. 9P. in the deed of 1763, and as four acres in the act, as being the piece of land now containing 3A. 9P., on part of which the hospital was built; and it is to be borne in mind that the act describes the four acres as being intended for the site of the hospital. It is \*evident, therefore, [717 that that intention was carried into effect, and that what is described as four acres in the act is identically the same piece of land as in 1763 contained, and now, in 1877, con-

tains 3a 9p.

But Mr. North also says that the fact that no conveyance of the legal estate by the trustees is to be found confirms his suggestion that there had been a conveyance of a portion of property to other persons. In my opinion it does not, and for this reason, that the fact that no conveyance of the legal estates was made is of just the same import whether the trustees were seised of the whole or part of the property originally conveyed to them; it neither prevents the presumption from arising nor supports in any way the inference that there had been a conveyance of a portion of the land to strangers.

I rule, therefore, that there is nothing to rebut the presumption, and that the evidence before me justifies the admission of the counterpart of the lease as evidence against

the defendants.

North, Q.C., and Warmington, for the same defendants: Another objection to the admissibility of the counterpart is that there is nothing to show that we claim under Gilbert.

It cannot be presumed that Gilbert ever entered under the lease. That distinguishes the present case from *Doe v. Williams* ('). The admission in the lease that Gilbert was then in possession of the property cannot be read as against us

until the lease is proved.

Cookson, Q.C., and Decimus Sturges, for the plaintiffs: Doe v. Murless (\*) is another authority to show that the counterpart is admissible. We are not bound to prove entry under the lease. The mere fact that there is a lease and that the defendants are in possession raises the presumption that Gilbert entered under the lease, and that the defendants have derived their possession through him.

North, in reply: The plaintiffs are asking the court to assume that there is a lease, which is the very thing they 718] have to prove. The fact that \*we are in possession is prima facie evidence that we are owners in fee, not for

a term.

FRY, J.: The defendants are in possession of the property, and they say that that raises the presumption that they are owners of it in fee. Assuming that to be so, it must be borne in mind that it has been already proved to my satisfaction by the plaintiffs that the plaintiffs became the owners of the property in 1763, and I have already held that the presumption follows that they are still the owners. The effect of the document which is tendered in evidence is or may be to convert the possession of the defendants into a rightful possession. I think, therefore, that I must admit the counterpart as evidence, because I think that the presumption is that the defendants' title is a rightful one, and it will be made a rightful one and consistent with the plaintiffs' title, if that document be admitted, and if it be presumed against the defendants that an entry was made by the lessee under the lease, and that they are in possession by some title deriving its force from the original lease.

I therefore admit the document, and presume as against the defendants that the original lessee entered, and that the

defendants claim by devolution from him.

The defendants then put in evidence a deed of the 21st of March, 1875, which was a lease of the property by Thomas John Shaw and Sarah Shaw to Charles Jones for thirty-five years from the 25th of December, 1874, the rent being reserved to the lessees, their heirs and assigns; a deed of the 22d of April, 1875, which was an assignment of that lease to the defendant Knotts; a deed of the 22d of March, 1869, by which R. M. Shaw and T. J. Shaw purported to mort-

gage the property in fee to J. J. Welch; and a deed of the 20th of January, 1858, by which Robert Shaw demised the property to G. T. Saltmarsh for twenty-five years from the 25th of December, 1857, the rent being reserved to the lessor, his heirs and assigns.

North, Q.C., and Warmington, for the same defendants: As a matter of form we raise the defences which were urged \*before the Master of the Rolls upon the hearing of [719 the demurrer. The evidence we have adduced is sufficient

to rebut the legal presumption against us.

Cozens-Hardy, for the defendant Watney.

FRY, J.: The principle legal questions arising in this case have been determined by a demurrer which was argued before and decided by the Master of the Rolls. He overruled the demurrer, and held that the plaintiffs had on their statement of claim disclosed a case which proved them to be entitled to relief.

The question, therefore, before me is, whether that state-

ment of claim has been upheld by the evidence.

The various points urged by way of objection to the plaintiffs' title have for the most part been disposed of during the course of the argument, and one point only remains which requires attention. I have admitted the counterpart of the lease of 1783 as evidence against the defendants. have presumed against them that there was an entry under that fease, and that they claim in some way by devolution from the lessee under that lease. Mr. North now says that he has made out a case which rebuts the presumption which I so raised against him, and he puts it shortly in this way: From the 20th of January, 1858, down to nearly the present time there have been acts by the defendants, or by those under whom they claim, which asserted in them a freehold title. For instance, by the deed of the 20th of January, 1758, Robert Shaw, who appears to have been ancestor in title to the defendants the Shaws, granted a lease to a certain Mr. Saltmarsh, and thereby reserved the rent to himself, his heirs and assigns. Similarly, in 1869, the two Shaws mortgaged the two-thirds which they appear to have derived under their father's will to a Mr. Welch, and affected to mortgage it in fee. It is said that this evidence of the acts of the persons in possession by which they asserted themselves to be owners in fee rebuts the presumption which I raised against them that they have derived their title from the lessee of the plaintiffs. I do not think it does. be borne in mind that the lease of 1783 was executed many \*years ago, that no beneficial rent was payable under [720]25 Eng. Rep.

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it, and further, that it imposed upon the lessee no onerous covenants, and did not require him to do anything which in the case of ownership in fee would not have been done. There was, therefore, nothing to remind the lessee and those claiming under him of his title, and it may well be that the recollection of that title and its leasehold character was lost. It appears, in short, that the acts which are proved by the defendants do not enable me to say that the presumption which I raised against them has been rebutted. That being the only question on the evidence which I did not dispose of during the opening, I determine it also against the defendants, and consequently I must give judgment in the terms asked.

I must make one other observation. It does appear to me that this is a very hard case upon the defendants, and I should be very glad if the plaintiffs should be able to recollect that charity may be shown to publicans as well as to sinners.

From this judgment the defendants appealed. The appeal

came on to be heard on the 26th of April, 1878.

Sir H. Jackson, Q.C., and Cozens-Hardy, for the defendants Watney and Knotts: The principle point argued before Mr. Justice Fry was, whether, as between the plaintiffs and the defendants, the plaintiffs had made out their title to the reversion of the land held by the defendants. On that point we urge that the counterpart of the lease was improperly received in the court below as evidence against the defendants.

Cookson, Q.C., and Decimus Sturges, for the plaintiffs: This is a renewal of the objection to the reception of evidence admitted at the trial. The appellants cannot renew that objection on the appeal from the judgment. They ought to have moved for a new trial for wrong admission of evidence.

JAMES, L.J.: This is not an appeal from the finding of a distinct issue by the judge. It is an appeal on all points of 721] law and fact \*on the trial of the whole case. The objection to the reception of the evidence can therefore be

properly raised.

Sir H. Jackson, Q.C., and Cozens-Hardy: We admit that the counterpart would have been evidence against Gilbert of the title of his lessors, and that the lease was executed, and that he had entered under it, but the plaintiffs have not connected the possession of the defendants with Gilbert. There is no evidence of any privity between the defendants and Gilbert, or that the defendants are in pos-

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session under the lease. Prima facie, their position raises a presumption that they had the fee simple, and there is no evidence to rebut that presumption. The mere existence of a lease of the same land to Gilbert is not sufficient, for the lease may have been surrendered: Sugden v. Lord St. Leonards ('); Doe v. Murless ('); Doe v. Williams (').

The main questions in the suit, namely, if the lease of 1873 was void or voidable under the statute of Elizabeth. and if so, if the plaintiffs are barred by the Statute of Limitations, were not argued before Mr. Justice Fry, who considered himself to be bound by the decree of the Master of the Rolls on demurrer. These questions are, however, open

on this appeal.

We therefore contend, first, that the lease of 1873 was not That statute was invalid under the 13 Eliz. c. 10, s. 3. passed for the purpose of preventing incumbents of ecclesiastical benefices and the heads of ecclesiastical corporations from making leases for their own benefit to the prejudice of their successors. It was not intended to prevent an aggregate corporate body like the plaintiff corporation from making leases for the benefit of the whole body. The evidence shows that this lease was not an improvident lease, and the existing members of the corporation when it was granted got no greater benefit from it than their successors: Magdalen College Case (1). In the second place, it does not apply at all to corporations subsequently created by act of Parliament. Corporations like Magdalen Hospital were unknown at the date of the act. Hospitals then were religious houses for the reception of monks and others for offering prayers, and for giving casual relief to the \*poor, not  $\lceil 722 \rceil$ for reforming the vicious. This is confirmed by the 14 Eliz. c. 14, which explains and extends the provisions of the former act to the "master or guardian" of all hospitals, "maisons dieus, beade houses, and other houses ordained for the sustentation or relief of the poor": Crossley v. Arkwright (').

[James, L.J., referred to Ex parte Arrowsmith (\*).]

But if the court should be of opinion that the lease was within the provisions of the 13 Eliz. c. 10, we rely upon the operation of the Statute of Limitations. The lease, if within the statute of Elizabeth, was void ab initio. If such a lease was granted by a corporation sole or by the head of a corporation aggregate, it has been held that it is not void ab

<sup>(1) 1</sup> P. D., 154. (2) 6 M. & S., 110.

<sup>(\*) 6</sup> B. & C., 41.

<sup>(4) 11</sup> Rep., 66 b; 1 Roll Rep., 151, (5) 2 T. R., 603,

<sup>(6)</sup> Ante, p. 96,

initio, but is good as against the grantor, but may be avoided by his successor: Coke upon Littleton ('). here the lease was granted by the corporation aggregate without a head; it was therefore void ab initio: Morrice v. Antrobus (\*); Chapter of Southwell v. Bishop of Lincoln (\*). But if it was voidable only, the plaintiffs are still barred by the statute, for the statute would begin to run from the time when the right to make an entry or bring an action accrued, which would be immediately after the grant of the lease, or at any rate, at the end of twenty-one years from that time: Roe v. Archbishop of York('); Doe v. Burrell('); Pennington v. Cardale('); Magdalen College, Oxford, v. Attorney-General ('); Attorney General v. Davey ('); Attorney-General v. Payne (').

Warmington, for the defendants Shaw.

JAMES, L.J.: We only desire to hear counsel for the plaintiffs on the defence of the Statute of Limitations.

Cookson, Q.C., Davey, Q.C. (Decimus Sturges with them), for the plaintiffs: If the plaintiffs' contention is correct, every such lease would become unimpeachable twenty years after it was granted, which \*would entirely defeat the intention of the statute. All the authorities show that such a lease is not void ab initio, but voidable. Magdalen College, Oxford, v. Attorney-General (') was a case in which there had been a breach of trust, and is not at all applicable to the present case. Pennington v. Cardale (\*) is in our Then, if the lease was voidable, at what time did the right to bring an action commence? Surely not till the lessors declared their election to avoid the lease. Until that time there could be no adverse possession. In the present case the plaintiffs did not exercise their election till the issuing of the writ; that must therefore be the time when the statute began to run. It is the same as if the lease contained a proviso that the lessor might at his option re-enter at any time. In such a case there would be no adverse possession till the lessor had exercised his option to enter.

Sir H. Jackson, in reply.

THESIGER, L.J., delivered the judgment 1878. April 16. of the Court (James, Cotton, and Thesiger, L.JJ.).

After stating the facts of the case as set forth above, his Lordship continued:

- (\*) Hardr., 825. (\*) 1 Mod., 204; 2 Mod., 56. (\*) 6 East, 86.
- (5) 12 Q. B., 1011 n.

- (6) 8 H. & N., 656.
- (1) 6 H. L. C., 189. (8) 4 De G. & J., 186.
- (\*) 27 Beav., 158.

The action subsequently came on to be tried before Mr. Justice Fry, when the counterpart of the lease of 1783 was put in evidence, the identity of the parcels being proved by plaintiffs' surveyor. It was objected that the lease without proof connecting the defendants with the lease was not evidence of title against them; but the learned judge overruled the objection, and, after finding that certain acts of ownership on the part of the defendants, such as leases and a mortgage in fee which were proved to have taken place between 1858 and 1875, but which have properly not been relied on in argument in this court, did not displace the plaintiffs' proof of title, and holding that he was bound by the decision of the Master of the Rolls on the questions which were the subject of the demurrer, gave judgment to the effect already The defendants contend that his judgment is erroneous, \*first, on the ground that the plaintiffs [724 did not, as against the defendants, make out a title to the premises sought to be recovered. They urge that the fact of the execution of the lease of 1783, although it might be good evidence of title in the plaintiffs as against the original tenant and persons claiming under him, is not admissible to prove, and does not prove, against the defendants, the origin of whose possession is not affirmatively shown, either the creation of the term or its continuance, or raise any presumption of privity in the defendants to such terms. this contention is not a well-founded one. The fact of the execution of the lease was admissible as proof of an act of ownership on the part of the plaintiff corporation, prima facie evidencing a title in fee, and the defendants being admittedly in possession of land included in the lease, the law will refer that possession to a rightful rather than a wrong-There being then a course through which title ful title. may be lawfully derived, viz., by supposing the defendants to be privy to the term, their possession will be prima facie referred to that privity, and if it be in fact referable to some other title, it is for those within whose knowledge the matter is to prove the fact: Doe v. Murless (1).

Failing this first contention, it has been next argued on the part of the defendants that the Magdalen Hospital is not within the provisions of the 13 Eliz. c. 10, as explained by 14 Eliz. c. 14. It is true, as has been pointed out by the defendants' counsel, that the preambles to the sections of the former act show that it was primarily directed against "ecclesiastical persons," to use the words of the 1st section, or "persons having spiritual promotion," to use the words of

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the 2d section, but the expression "guardian of any hospital" found in the act is wide enough to include lay persons and to extend to secular institutions; and although in 1571 hospitals, whatever might be the main purpose of their foundation, were no doubt very commonly connected with spiritual ends and governed by ecclesiastical persons or persons having spiritual functions, we see no ground for confining the act to the case of hospitals so connected and governed, and are of opinion that a modern statutory corporation forming the governing body of a hospital such as Mag-725] dalen Hospital is within the purview and \*subject to the provisions of the act passed in that year. The later act, 14 Eliz. c. 14, so far from militating against this view, rather strengthens it, for, on the one hand, it is clear from its scope and object that it must not be construed so as to limit the meaning which might, apart from it, be reasonably given to the expressions used in the earlier act; and, on the other hand, looking to the mention in the preamble of the hospitals of Christ's, Bridewell, St. Thomas, and St. Bartholomew, and the diverse character of those institutions as they even then existed, and to the inclusion in the last clause of the act of "all hospitals, maisons dieus, beade houses, and other houses ordained for the sustentation or relief of the poor," the argument in favor of giving a wide interpretation to the expression "guardian of any hospital" becomes very strong. That it is large enough to be applicable to the present case would be our opinion upon the mere construction of the statutes and apart from the opinions of others; but in the words of Vice-Chancellor Shadwell in Attorney-General v. Glyn ('), "I have always understood that it is quite a settled point that a lease that is made by an eleemosynary corporation, though not ecclesiastical, is within the operation of the statutes."

It is not, and could not reasonably be, disputed that if Magdalen Hospital and its governors are within the operation of the statutes of Elizabeth, the lease of 1783 is one prohibited by those statutes, and the plaintiffs' title being established, the only remaining question is whether the plaintiffs' right of action to recover possession of this property pending the lease is barred by the Statute of Limitations (3 & 4 Will. 4, c. 27). In dealing with this question we treat the lease as voidable only, and not void, pursuant to what was undoubtedly a principle of the decision, and not a mere obiter dictum, in the considered judgment in Pennington v. Cardale (1), and pursuant to the general princi-

(1) 12 Sim. 87.

(º) 3 H. & N., 666.

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ples of law applicable to forfeitures or breach of covenant and other analogous cases. But although the lease may be voidable only, is there any reason why sect. 2 of the statute should not be held to apply, so as to make the period of limitation run from the time of the granting of the lease where, as here, an action of ejectment might have been commenced the very day it was granted? It has been argued on the part of the \*plaintiffs that the right to re- [726] enter and consequently to bring an action, does not arise in a case like the present until the mind of the lessor determines to avoid the lease, and that the issuing of the writ, although not the actual election itself, is an overt act evincing the election to avoid, and making the right of action accrue only upon the election so evinced, i.e., upon the commencement of the action; but this argument appears to us to be a mere speculative refinement, not consistent with fact or reason. As a matter of fact it is admitted that no election need be proved to have existed, still less to have been communicated to the lessee, and that the supposed election has no real existence at all apart from the writ. Why, then, is an election to be presumed other than the election which is constituted by the action itself? the action requires no precedent act to support it, how can it be said that the right to bring such action does not accrue as soon as the lease is made?

In the case of a tenancy at will prior to the 3 & 4 Will. 4, c. 27, time did not run against the lessor, for the reason that no action of ejectment could be brought until lawful possession under the tenancy was determined by a demand of possession or other specific act evidencing and expressly or impliedly communicating to the tenant the intention to determine the tenancy; but even for that case the Legislature has made provision in the 7th section of the act, and time now runs either from the actual determination of the tenancy or from the expiration of one year after its commencement, at which time it is to be deemed to have determined. It would seem strangely unreasonable that the statute should apply to a case where a right of action has not in fact or in law existed at any time, and where the tenancy has never been anything but a lawful tenancy, not subject to avoidance although capable of immediate determination, and should not apply to the case of a term declared by statute to be "utterly void and of none effect to all intents, constructions, and purposes," and which, even though voidable only, can be avoided and put an end to at any moment by the mere issuing of a writ. The words of the 2d section Governors of Magdalen Hospital v. Knotts.

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are wide enough to prevent such an inconsistency. should they not be read so as to prevent it? Again, the event of a person becoming entitled to land by reason of any forfeiture or breach of \*condition is expressly provided for in the 3d section of the act, the right being deemed to have accrued when such forfeiture was incurred or such condition was broken. But in cases coming within this provision the right of entry or action does not, strictly speaking, any more than in the present case, become absolute in the absence of an election on the part of the person claiming the land to take advantage of the forfeiture or breach of condition, although no other election than that. constituted by the issuing of a writ is necessary to be proved. Such cases, therefore, are strictly analogous to the present one, and it is difficult to conceive that the statute could have been intended to make a distinction between them. maxim "Expressio unius exclusio alterius" is not applicable here, for the object of the 3d section is not to cut down or limit the meaning of the 2d, or even to give a complete explanation of the terms used in that section, but to explain and give a construction to the enactment contained in the 2d section in certain cases really coming within that section, but in respect of which there might be a doubt as to when the right of entry or distress or action first accrued: James v. Salter ('). The mention, therefore, in the 3d section of cases of forfeiture or breach of condition, so far from being an argument for excluding from the operation of the 2d section the case of a lease voidable by law from the moment of its inception, is rather an indication of the intention of the Legislature to extend the statute to such a case, and affords an illustration of the manner in which its provisions should operate. It is to be observed, also, that the statute speaks not only of the right of action but of the right of entry, and, in truth, where the claim is to the possession of land, the real right is the right of entry, and the right of action is only given to enforce the right of entry. By the theory of the law a man who is entitled to the possession of land in the actual occupation of another has a right, if he can do it peaceably, to eject the intruder and to put himself in his place; and it is on the theory and assumption that he is prevented from so righting himself that he appeals to the Sovereign to do him right and put him in possession. old action of ejectment accordingly had its fiction of lease, entry, and ouster.

728] \*The real right being the right of entry, when did

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that right accrue? Not on demand or notice, for no demand or notice is necessary; and not on the entry itself, for the entry is in assertion of the pre-existing right. Where a lease is voidable the right is not to enter and thereby avoid the lease, but to take possession notwithstanding the lease, treating the lease as void, and when that right accrued, then there was the right of entry within the meaning of the stat-If that be so, then in the present case, where there is no personal disability, the right of entry, and the consequent right of action, existed the moment that the lease of 1783 was granted, and from that moment the period of limitation began to run. We refer to the fact of there being no personal disability because, of course, the observations which we have made as to the immediate accrual of the right of entry and action would not apply in a case where the voidable lease is made by the head of a corporation within the statute of Elizabeth, for such lease cannot be avoided while he continues the head; and in such a case the Statute of Limitations will begin to run only from the time when he ceases to be head, that being the earliest period of time at which the lease can be avoided. So far we have considered this question apart from authority.

On behalf of the defendants, three decided cases have been cited, viz., Magdalen College v. Attorney-General ('); Attorney-General v. Davey (\*), and Attorney-General v. Payne (\*). In the first, the House of Lords decided that charities were within the operation of 3 & 4 Wm. 4, c. 27, and that a lease for ever, subject to a rent, of certain lands held for charitable purposes, even if in its inception unauthorized by the trusts of the particular charity, could not as against the lessee be impeached in a suit by the Attorney-General, representing the cestuis que trust, except within twenty years. In Attorney-General v. Davey the decision in Magdalen College v. Attorney-General was held to govern a case where charity land had been held under a lease for 500 years granted in breach of trust, and in Attorney-General v. Payne the decision of the House of Lords was further applied to the case of an improvident lease granted by a charitable corporation. These cases were \*distinguished by the Master of the Rolls in his judgment in the present case, and have been distinguished in argument before us on the ground that in them, to use the words of the Master of the Rolls ('), "there was a right to impeach the · lease upon equitable grounds immediately after it was

<sup>(1) 6</sup> H. L. C., 189.

<sup>(8) 27</sup> Beav., 168. (4) 5 Ch. D., 182; 22 Eng. R., 14.

<sup>(&#</sup>x27;) 4 De G. & J., 186. 25 Eng. Rep.

It was not like a case of avoidance, it was an original defect in granting the lease." There is, no doubt, some foundation for the distinction drawn. Where a lease is made in breach of trust, the avoidance of such lease takes effect ab initio, and may render the lessee liable to account for back profits, while the lessee under a voidable lease has a lawful possession until the lease is actually avoided, and is not liable in an action for mesne profits for anything prior to the avoidance. It may be said, therefore, that in the former case the possession is adverse throughout, while in the latter it only becomes adverse when the determination to put an end to it is communicated either by service of writ or otherwise. But the distinction referred to, although existing in point of fact, does not necessarily carry with it different legal consequences so far as the Statute of Limitations That statute has got rid of the doctrine of is concerned. adverse possession, and renders immaterial the inquiry into the nature of the possession of the person against whom the claim to land or rent is made. The question under it, and upon which the case of Magdalen College v. Attorney General (1), and the cases following it, proceeded, is, whether twenty years have elapsed since the claimant's right of entry or action accrued; and if we are right in concluding that a lease voidable under the statute of Elizabeth may, equally with a lease in the granting of which there has been what the Master of the Rolls terms an original defect, be impeached by entry or action without any precedent act on the part of the person impeaching it, the principles of law which govern the one case are equally applicable to the other, and the decisions cited become authorities. In the one case the alienation is voidable in equity by the charity, the real owners, under the general law. In the present case the lease is voidable at law by the legal owners under the statute of Elizabeth. The anomaly would be great if in the one case time should begin to run when the right to avoid 730] accrues, and in the other only when \*the election to avoid is manifested by overt act. It cannot, at least, be denied that there is a considerable resemblance between the two classes of cases, and that the mischief intended to be remedied by the statute is to be found in the one as well as in the other; and when the argument for the plaintiffs is reduced to so fine a point as that the writ in the action is to be looked upon as at once the machinery by which the action is commenced and the act by which the right to commence it is given, or at least evidenced, common sense would

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seem to demand that the court should sweep away a refinement of this sort in favor of the simple view which carries out the objects of the statute and is at the same time consonant with its express language, that a right to issue a writ of ejectment to recover land held under a voidable lease, without proof of any prior act evidencing an election to avoid it, is a right to bring an action within the meaning of

the 2d section of the statute in question.

In coming to this conclusion we have been guided solely by the reasons which we have stated as the ground of our judgment; but it is at the same time satisfactory to us to feel that the interpretation which we have put upon the Statute of Limitations is one which prevents, in the present case and in cases of its kind, the infliction of very serious hardship. At this distance of time it is not easy to trace out what was the real consideration for the granting of the lease of 1783; but there is no reason for supposing that it was improvidently granted, while the circumstances set forth in the statement of claim point to its having been part of a series of arrangements under which exchanges of land were made and the hospital received a benefit. But however this may be, the lapse of ninety years, during which large sums of money must have been expended upon the property which was the subject of the lease, and numerous transfers have taken place on the faith of the title under it not being disturbed, gives proceedings under the old statute of Elizabeth a very harsh aspect; and when it is considered that at the present moment there must be many titles which, if their origin in the remote past were inquired into, would be impeachable under the same statute but for the existence of some limitation upon the right of action, the convenience of applying the Statute of Limitations to such cases, and the a priori argument in favor of its being so applied, become apparent.

\*The order of the court below must be reversed, [731 and judgment must be entered for the defendants with

costs, including the costs of this appeal.

Solicitors for plaintiffs: Wordsworth, Blake, Harris & Parson.

Solicitors for defendants: James, Curtis & James; Pownall, Son, Cross & Knott.

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# [8 Chancery Division, 731.]

C.A., May 2, 1878.

#### Ex parte Carter. In re WARE.

Liquidation by Arrangement—Release of Trustee—Non-payment of Rent to Debtor's Landlord—Jurisdiction of Court of Bankruptcy—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 20, 53, 125, subs. 9.

A debtor filed a liquidation petition on the 14th of September, and on the 3d of October a trustee was appointed. On the 26th of November the creditors resolved that the trustee should sell the debtor's estate for a sum sufficient to pay the creditors 4s. in the pound; that the debtor's discharge should be granted on the filing of the trustee's certificate that the provisions of this scheme of settlement had been complied with; and that the close of the liquidation and the release of the trustee should take place on and from the 28th of January. On the 4th of January these resolutions were approved by the court. The debtor was tenant of some business premises and some chattels for a term which expired on the 25th of December. The trustee took possession of the premises and the chattels, and remained in possession of them until the expiration of the term, but he did not pay the landlord the quarter's rent which fell due on the 25th of December. On the 25th of February the landlord applied to the Court of Bankruptcy for an order directing the trustee to pay him that quarter's rent. There was evidence that several applications had been made to the trustee for the rent in the course of January, and that he had said that he had left money with the debtor to pay it:

Held, that either the landlord's remedy was a personal one against the trustee, in which case the Court of Bankruptcy had no jurisdiction in the matter, or that, if there was a remedy in the Court of Bankruptcy, the trustee had done nothing more than commit a default in the administration of the assets, from liability for which he was protected by the release, there being nothing to show that there had

been any fraud in obtaining it.

Ex parte Société Cockrill (1) distinguished.

Sect. 53 of the Bankruptcy Act, 1869, applies to a release given by the creditors to the trustee under a liquidation by arrangement.

(1) 8 Ch. D., 115.

## [8 Chancery Division, 736.]

V.C.M., June 12, 13, 18; July 28, 1877. C.A., May 9, 1878.

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# \*Yarrow v. Knightly.

[1875 Y. 12.]

Will—Construction—Equitable Estate commensurate with Legal Interest—Fee Simple subject to happening of Event.

A testator devised certain freehold property to trustees, their executors and assigns, in trust as to three freehold houses for the sole benefit of his two daughters E. and S., either to live in or let for their joint benefit, and should either of his daughters die and leave no children or child, then either one of the houses, at the option of the survivor, to be sold, and the produce divided between the survivor and such of the testator's sons as should be living, but if either of his daughters should marry and have a child or children, then such child or children to have the mother's share of the rents and profits of the three houses after the mother's decease. On the death of one daughter without children one of the houses was sold, according to the direction in the will. The other daughter then died without children:

Held, that the gift for the sole benefit of the two daughters of the testator gave

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them an estate commensurate with the estate in fee given to the trustees, and made them joint tenants in fee subject to executory gifts over in the event of their dying leaving issue; and that, this event not having happened, the joint tenancy in fee was unaffected, and the devisee of the survivor was entitled to the two unsold houses.

This bill was filed for the administration of the estate of William Smith Yarrow. The testator, by will dated the 16th of January, 1826, gave and devised to Robert Hill and James Hill, his executors and trustees, all his five freehold houses, situate as follows: His dwelling house and garden, No. 3 John's Terrace, Hackney; his houses Nos. 65 and 63 in Holywell Street, Shoreditch; his house No. 2, also house No. 21, both in Cullum Street, in the City of London; and also two other freehold tenements; to hold to them the said Robert and James Hill, their executors and assigns, in trust, together with all his leasehold estates, money in the funds, and all other money and property, for the purposes thereinafter named. He then directed his trustees to pay to his wife, Susannah Yarrow, the whole rents and profits of all his freehold houses and leasehold estates during her life, excepting his freehold estate at Bedford, which he directed to be sold for payment of his debts and legacies. And after some dispositions of No. 65 Holywell \*Street, and [737] land at Bethnal Green, and a leasehold tenement at New St. Mary Axe, the testator gave to his son George, after the decease of his wife, his freehold tenement No. 163 Holywell Street, absolutely, subject to the payment of an annuity. He then continued: "I do give in trust to my executors and trustees for the sole benefit of my two daughters, Elizabeth and Sarah Susannah, my other three freehold houses, that is, my house No. 2 Cullum Street and my house No. 21 Cullum Street, in the City of London, and my freehold dwelling house and garden, being No. 3 John's Terrace, Hackney Road, either to live in or let for their joint benefit, and my desire and will is, should either of my daughters die and leave no children or child lawfully begotten, then either one of these freehold houses, at the option of the surviving sister, shall be sold, and the money produced after such sale by auction shall be equally divided between the survivor and such of my sons as may be living, share and share alike; but in case either of my daughters should marry and have a child or children, then such child or children lawfully begotten shall have the mother's share of the rents and profits of the three houses after it or their mother's decease; and my will and desire is that the husbands of either of my said daughters shall have no control or benefit in the before-mentioned houses and estates whatsoever, and the

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rents and profits shall in no way be applicable to their wants, debts, or acts; and the receipts of my daughters or my executors only to be a discharge for rents, and their signatures only to any lease or leases or agreements for let-

Susannah Yarrow, the widow of the testator, died on the 24th of June, 1845; Sarah, one of the daughters, died on the 3d of April, 1852, without leaving issue; Elizabeth Young, the other daughter, died on the 30th of June, 1874, also without issue, having by her will, dated the 13th of May, 1873, given the residue of her property to Charles Alfred Young.

After the death of Sarah Yarrow one of the three freehold houses was sold and the proceeds distributed according to

the directions in the will.

On the 27th of March, 1862, the surviving daughter, Elizabeth Young, granted a lease of one of the houses for twentyone years to William Still, who was made a defendant to the suit.

\*The action came on to be heard before Vice-Chan-**73**81

cellor Malins on the 12th of June, 1877.

Glasse, Q.C., and Langley, for William Yarrow, the heirat-law of the testator, William Smith Yarrow: This is a gift by the testator of three freehold houses to trustees for the benefit of his two daughters, either to live in or to let for their joint benefit. That is a joint tenancy for life, and it was evidently the intention of the testator that if his daughters left issue the issue should succeed, but if both died without issue, then the property in the two unsold houses

is undisposed of.

Bristowe, Q.C., and Oswald, for Charles Alfred Young. the devisee under the will of the surviving daughter: estate given by the testator to his two daughters is commensurate with that given to the trustees, which is a fee, and there being no words of severance, they take as joint This view of the case is confirmed by the decision in Moore v. Cleghorn ('). There the devise was to trustees and their heirs "upon trust for the use and benefit" of A., B., and C., or to the survivors or survivor of them, and it was held that A., B., and C. took equitable estates in fee as joint tenants. So in the case of Challenger v. Sheppard ('), it was held that where an estate in fee was given to trustees for A. B. without any limitation of the estate to the cestuis que trust, the latter took the beneficial interest in fee. There was a similar decision in Bennett v. Bennett (\*) and Toovey

<sup>(1) 10</sup> Beav., 423,

<sup>(9) 8</sup> T. R., 597.

The first event contemplated by the testator v. Bassett (1). is the death of one of the daughters without children, in which case he directs that one of the houses is to be sold. That event did happen, and the house was sold. The second event is the death of both daughters without issue, but in such a case there is no provision made for the estate to pass away from the daughter. As the event did not happen, the fee remained in the survivor, and her devisee is now entitled to the two houses.

[They referred to Jarman on Wills (').]

\*Higgins, Q.C., and Morris, for W. Still, the lessee [739] under the surviving daughter, cited Gatenby v. Morgan ('). J. Pearson, Q.C., and W. A. Clark, for the trustee.

Glasse, in reply.

MALINS. V.C.: This is a very peculiar will. The testator, being seised in fee of several freehold houses, gave and devised to his trustees all his five freehold houses and two freehold tenements to pay his wife the income for her life, and after her death to hold the property upon the trusts therein mentioned, and when he comes to the particular houses now in question the testator gives them in trust to his executors and trustees for the sole benefit of his two daughters, Elizabeth and Sarah, either to live in or let for their joint benefit. If the will had stopped there, as he had given the legal fee in the houses to trustees for the benefit of his daughters either to live in or let, I take it to be clear that whatever the estate was which the daughters took, they would have taken it as joint tenants. But what is the extent of the interest they take? In the absence of any special circumstances, where an estate is given in fee to trustees in trust for any persons, then the estate of the cestui que trust will be commensurate with the estate given to the trustees, and if the estate so given to the trustees is a legal estate in fee, the cestui que trust will take also in fee, and the estate would be a joint tenancy or tenancy in common, according to the words of the will. Here the testator gives the property in such a manner that the legal fee is in the trustees in trust for the benefit of his daughters. The settled rule always has been, that where an estate is given to A. and his heirs in trust for B., then, the legal estate being given to the trustee, the cestui que trust will have an equitable estate commensurate with the legal estate.

That was laid down in Challenger v. Sheppard ('). The equitable interest is commensurate with the legal interest,

<sup>(1) 10</sup> East, 460. (2) 3d ad., yol. ii, p. 252.

<sup>(3) 1</sup> Q. B. D., 685; 18 Eng. R., 119. (4) 8 T. R., 597.

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and the legal interest being a fee, it follows that the equitable interest will also be a fee. That was followed by 740] Moore v. Cleghorn (1). I \*find in my copy of Jarman that I made a note many years ago opposite to the words "It is now settled that where lands are devised to trustees in fee in trust for a person without any words of limitation, the cestui que trust takes an equitable interest coextensive with the legal estate of the trustees, i.e., a fee: Challenger v. Sheppard (\*). The words I wrote were, "This point is now settled by Moore v. Cleghorn" (\*), the case of Moore v. Cleghorn having been decided after my copy of Jarman was published. That case decided the broad principle that where a legal estate is given to trustees in trust for another, then, unless where there are special circumstances, the equitable estate will be commensurate with the Then the case of Knight v. Selby (\*) laid legal estate. down the same principle.

Therefore, the legal estate being given to the trustees for the benefit of the two daughters, they necessarily take the fee, and, there being no words of severance, they take as joint tenants. If, as I have said, the words had stopped there, the two daughters would have become entitled to the

whole of the property in fee.

Then it is said that it cannot be a joint tenancy, because part of the property is given over in another way. The words are these: "Should either of my daughters die and leave no children or child lawfully begotten, then either one of these freehold houses, at the option of the surviving sister, shall be sold, and the money produced after such sale by auction shall be equally divided between the survivor and such of my sons as may be living, share and share Now what is the consequence of saying that if a particular event happens, that is, if one of my daughters die and leave no child or children, then a part of the property is to be taken out and sold? Why should that interfere with the joint tenancy of the remaining two houses which the daughters took? All the three houses were devised generally. The testator in a particular event takes one of them out; that particular event happened, and one house is taken out of the limitation and disposed of in another way. Suppose a testator gives property to a particular person and adds this proviso, but if John Smith returns from abroad, then he is to have a portion of the 741] property. That would \*be precisely similar to this clause. One house is taken out of the limitation to the (1) 10 Beav., 423. (2) 8 T. R., 597. (8) 10 Beav., 423. (4) 3 Man. & G., 92.

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daughters in a particular event, and as that event did happen, that house is excluded from the devise.

Then the testator proceeds, "But in case either of my daughters should marry and have a child or children"—that is another event which, in fact, never did occur, that is, the death of either of his daughters leaving a child or children—such child or children are to have the mother's share. So as to that event the limitation is left untouched.

Now, irrespective of that altogether, there is a further reason why the two daughters should take in fee simple. In the well known cases of Frogmorton v. Holyday (') and Doe v. Cundall ('), followed by Toovey v. Bassett ('), it was decided that where property under the old law is given to A., and if he shall happen to die under twenty-one, then the property is to go over, that gives an estate in fee to the first taker, because if he is to lose it only in the event of dying under twenty-one, it is only in one case that he is to lose it, and he is otherwise to have the entire property. If the event happen, it will go over; if not, it will remain.

Suppose I give all my lands to my daughter. That of itself was by the old cases a mere gift for life, because there are no words of inheritance; but if I say that in case she leaves no child the estate is to go over, then it is to go over in that event only, and if the event does not happen, then she retains it forever. In this case the words are, "But in case either of my daughters should marry and have a child or children, then such child or children shall have the mother's share." So she is only to part with the property in the event of her leaving children.

Therefore, on the two grounds, first, that there is an equitable estate in the daughters commensurate with the legal estate in the trustees, and there are no words to alter the effect of the rule which I have stated; and, secondly, that the property is only to go over in case of an event happening which never did happen, I think the daughters took the estate jointly in fee. There must, therefore, be a declaration that under the will of William Smith \*Yar- [742 row, W. Yarrow had no interest in the estate, and that the estate vested in his two daughters as equitable tenants in fee, and Mrs. Yarrow, as the survivor, became entitled to the whole of the property.

Some parties entitled in the event of intestacy, who had obtained leave to attend the proceedings, appealed. The appeal was heard on the 9th of May, 1878.

<sup>(1) 8</sup> Burr., 1618. 25 ENG. REP.

<sup>(2) 9</sup> East, 400.

<sup>(8) 10</sup> East, 460,

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Higgins, Q.C., and Dauney, for the appellants: We contend that the Vice-Chancellor took an erroneous view of the effect of Moore v. Cleghorn (') and Challenger v. Sheppard ('). We do not dispute that a simple gift to A. and his heirs in trust for B. gives B. an equitable fee, but the difference between those cases and the present is shown by Re Pollard's Estate ('). The fee cannot be thus given to persons where there are limitations over after their deaths.

Cozens-Hardy, for a party in the same interest. Glasse, Q.C., and Langley, for the plaintiff. J. Pearson, Q.C., and Hadley, for the trustee.

Bristowe, Q.C., Everitt, and Maidlow, for Young, in sup-

port of the order, were not called upon.

JAMES, L.J.: I am of opinion that the decision of the Vice Chancellor must be affirmed. It is of no use to ask what the testator actually intended in the events which have happened; he probably had not an idea on the subject. We can only construe his will by taking the words he has used, and applying the general rules of construction. Before the Wills Act words of inheritance were generally necessary to pass the fee in freehold estates, but one of the exceptions was, that if, either by words of inheritance or by other words, a fee was given to trustees, a declaration of trust without words of inheritance would pass the equitable 743] fee to the beneficiaries. A \*doubt might well have been entertained in the case of a devise in fee to trustees upon trust for A. for his life, and after his death for his children; but it has been decided that the children take a fee, and there is no reason to disturb that decision. there is no doubt that the trustees take a fee, and the words "for the sole use and benefit of my daughters either to live in or let," would, if the will had stopped there, have given the daughters an equitable fee. Then, as the Vice-Chancellor asked, is there anything to cut down this fee? The testator makes particular limitations, which in certain events defeat the original gift, but they appear to me to be only executory limitations, which, so far as they do not take effect, leave the original gift unaffected.

BAGGALLAY, L.J.: If the will had ended with the words "either to live in or let for their joint benefit," the daughters would, according to the authorities, have taken an equitable fee. Then the testator mentions two cases, in each of which he intends that gift in fee to be modified for the benefit of other persons. First, if one of the daughters

<sup>(1) 10</sup> Beav., 423.

<sup>(9) 8</sup> T. R., 597.

<sup>(8) 3</sup> D. J. & S., 541.

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dies without leaving a child, in which case one of the houses is to be sold and the proceeds divided in a particular way; and, secondly, in the case of a daughter dying leaving children the children are to take her share after her death. far as these limitations do not take effect, the original joint beneficial gift in fee remains undisturbed.

Bramwell, L.J.: I also am of opinion that the decision

of the Vice Chancellor must be affirmed.

Solicitors: E. W. Parkes; J. Haines; Tippetts & Co.; A. S. Ramskill; W. T. Reeve.

[8 Chancery Division, 744.]

V.C.B., Jan. 18: C.A., May 10, 1878.

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[1877 J. 98.]

Trust Deed for Creditors-Communication to Creditors,

A man conveyed all his property to the defendants upon trust to pay thereout a sum of £5,000 which they were to raise on his behalf, and all other debts due from the assignor, including a debt due to the plaintiff. The defendants realized the the assignor, including a debt due to the plaintiff. The defendants realized the property of the assignor, and alleged that they had paid some of the debts out of the proceeds. The plaintiff brought an action against the defendants asking for an account of the property, and that the debts of the plaintiff and the other creditors might be satisfied thereout. The statement of claim contained no allegation that the assignment had been communicated to the plaintiff. The defendants demurred:

Held (reversing the decision of Bacon, V.C.), that the defendants were not trustees for the plaintiff and that the degree week he allowed.

for the plaintiff, and that the demurrer must be allowed. Garrard v. Lord Lauderdale (1) and Acton v. Woodgate (2) followed.

DEMURRER to an action by a creditor against the trustees of certain deeds of assignment for the benefit of creditors.

The statement of claim contained the following allegations:-

In the month of June, 1871, William Meyrick, who had been previously in partnership with the defendants, J. James and another, as solicitors, was indebted to the plaintiff in a sum of £3,500, for which sum Meyrick was personally liable, and his firm was also collectively liable to him for the same sum.

Meyrick being in pecuniary difficulties agreed that the defendants should borrow £5,000 for the payment of his debts, or some of them. The repayment of this sum to the defendants was secured by a mortgage by Meyrick to them of certain leasehold premises and other property, dated the 22d of June, 1871.

By another indenture of the same date Meyrick appointed

(1) 2 Russ. & My., 451.

(\*) 2 My. & K., 492.

the defendants his attorneys for the purpose of winding up the partnership and to get in all debts due to him, and all his goods, chattels, and effects, and to stand possessed of the moneys to be received and got in in trust to pay the debts due from Meyrick, including the plaintiff's said debt; and by a deed dated the 23d of June, 1871, Meyrick assigned to the defendants certain policies of assurance and other property for the like purpose.

745] \*By two other indentures dated the 1st of November, 1871, Meyrick assigned all his share in the partnership to the defendants upon trust to pay thereout the aforesaid sum of £5,000, and also all other debts due from him, in-

cluding the plaintiff's said debt.

In May, 1874, Meyrick became bankrupt. The defendants, acting or purporting to act under or by virtue of the said several deeds, obtained possession of the entire estate and effects of Meyrick, from which they had received large sums of money, and they alleged that they had expended the whole of such moneys in payment of some of the debts of Meyrick, but had not paid the plaintiff any part of his said debt, and had never rendered him any accounts showing their dealings with the said estate and effects.

The plaintiff had seen some accounts purporting to be a partial account of the dealings of the defendants with the trust property and effects, which, if correct, showed that the defendants had not fairly and properly described Mey-

rick's debts.

The plaintiff claimed that an account should be taken of Meyrick's estate and effects, and of the defendants' dealings therewith; and that the estate and effects might be administered by the court, and the debts of the plaintiff and of other creditors satisfied thereout. The plaintiffs demurred generally to this statement of claim; they also denied several of the allegations contained in it.

The demurrer was heard before Vice-Chancellor Bacon on

the 18th of January, 1878.

Hemming, Q.C., and Romer, in support of the demurrer. Sir H. Jackson, Q.C., and Cottrell, for the plaintiff.

Hemming, in reply.

BACON, V.C.: The whole substance of Mr. Hemming's argument comes to this—that under these deeds the plaintiff has no right to maintain this suit, because he has not said in his pleadings that they were communicated to him; and that is the sole point to be decided.

Now, the law upon the subject has been very plainly stated. Where an assignment has been made for the benefit

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of creditors, \*unless there has been communication, [746 the maker of the deed and the grantee have power over the deed, and can revoke it whenever they think fit. But if the trustee be himself a creditor, or if there has been a communication of the deed to a creditor, or to any number of creditors, where the transaction is between a debtor and some of his creditors for the benefit of all, how can it be said that the deed is revocable, at least without the consent of the trustee named in it?

All that doctrine about the trustee being a mandatory, holding money to be applied for the benefit of the particular persons named, unless the debtor directs some other application of it, has nothing to do with the case before me.

In this case, the debtor, Meyrick, was indebted to three persons, the defendants being two of them, and the plaintiff being the third. The defendants and Meyrick came to an arrangement between themselves that the property of Mevrick should be applied to the payment of Meyrick's debts, including the debt owing to the plaintiff, and the deeds were executed on that footing. It is confessed that the origin of the transaction was, that the defendants should take their security upon trust to pay all the debts; and that the deed was executed, and the subject-matter of it taken possession of, apportioned, and applied by them, in execution of the trusts. No suggestion has been made that it was in the power of the defendants to revoke the deed without the consent of the plaintiff, the remaining creditor. it should be held to be in the power of the trustees to communicate the contents of such a deed as this to two or three of the creditors, and to divide the property between themselves and these two or three creditors, to the exclusion of the rest, that would be creating other trusts than those which are declared by this deed.

Admitting all that has been argued respecting the necessity of communication of such a deed as this, more has been done here than mere communication, for here there has been, as the defendants admit, a part execution of the trusts. There has been, as the defendants admit, no revocation. The trusts are subsisting trusts, which the plaintiff has, in my opinion, upon all the facts which have been stated, a

perfect right to insist upon execution in this court.

\*The case of Siggers v. Evans ('), before Lord [747 Campbell, went very fully into the various questions which have been adjudicated upon in this court, and established this very plain distinction. A debtor, having an execution

threatened, made an assignment to one of his creditors upon trust for the others, and that assignment was held to prevail against the execution creditor. It was established beyond all question that the deed was irrevocable, so far as the maker was concerned, without the assent of the trustee, he being himself a creditor. If it could have been rescinded, it could only have been with the joint assent of all the creditors, including the trustee.

In my opinion the demurrer must be overruled.

From this decision the defendants appealed. The appeal

was heard on the 10th of May, 1878.

Hemming, Q.C., and Romer, for the defendants, in support of the demurrer: The plaintiff is not entitled to sue in this court. He is not a cestui que trust under the deed, nor in such a position as to be entitled to the assistance of the court. When a deed is executed by a debtor whereby property is vested in trustees for the purpose of paying the debts, no creditor is a cestui que trust entitled to sue except a creditor to whom the fact of the execution of the deed has been communicated, and who has acted upon that knowl-Where the trustee is a creditor there is a trust, but it is for him alone and not for the other creditors who have received no communication. This claim does not state that the fact of the execution of the deed was communicated to the plaintiff, and hence is defective and demurrable. Acton v. Woodgate (1) the trustee was a creditor, as here, and yet it was held that the other creditors were not cestuis que trust.

[They also cited Walwyn v. Coutts (\*); Garrard v. Lord Lauderdale (\*); Gibbs v. Glamis (\*); Mackinnon v. Stew-748] art ('); Glegg \*v. Rees ('); Wilding v. Richards ('); Griffith v. Ricketts ('); Smith v. Hurst ('); Ex parte Pye (''), Sir H. Jackson, Q.C., and Cottrell, for the plaintiff:

Without disputing any of the authorities cited, although Garrard v. Lord Lauderdale (") appears not to have been approved by Vice-Chancellor Knight Bruce in Wilding v. Richards, the rule is, that where a trust, created in favor of volunteers, has been executed, the court will fasten a trust on the conscience of the trustee, and decree its execution. This it will do by force of the statute of Elizabeth; the rule

- (1) 2 My. & K., 492.
- (²) 8 Mer., 707. (8) 8 Sim., 1; 2 Russ. & My., 451.
- (4) 11 Sim., 584. (5) 1 Sim. (N.S.), 76.
- (6) Law Rep., 7 Ch., 71.

- (\*) 1 Coll., 655. (\*) 7 Hare, 299.
- (9) 10 Hare, 30.
- <sup>hó</sup>) 18 Ves., 140.
- (11) 2 Russ. & My., 451.

being, that whenever a debtor has assigned property to an assignee for the benefit of creditors, when any creditor has had notice, or whenever the deed has been in fact executed to any extent, all the creditors are cestuis que trust, and may have execution of the trusts decreed by the court. claim, though it does not aver communication to the plaintiff, yet does aver that the deed has been executed to the exclusion of the plaintiff, and thus it avers knowledge of the fact of the execution: Ellison v. Ellison ('); Nicholson v. Tutin (\*); Raworth v. Parker (\*); Siggers v. Evans (\*); Hobson v. Thellusson (\*); Harland v. Binks (\*); Kirwan v. Daniel ('); Cosser v. Radford (\*).

JAMES, L.J.: I am of opinion that the decision of the Vice-Chancellor in this case ought not to be affirmed, and

that the demurrer ought to have been allowed.

It appears to me to be too late now to question the principle of Garrard v. Lord Lauderdale; it is too late now to repeat the doubts which were expressed by Vice-Chancellor Knight Bruce as \*to the original propriety of the decision, and which, I must confess, I am not disposed to share.

Garrard v. Lord Lauderdale (\*) seems to me to have proceeded upon the plainest notions of common sense. It is quite obvious that a man in pecuniary difficulties, having a great number of debts which he could not meet, might put his property in the hands of certain persons to realize and pay the creditors in the best way they could. It was held by the Vice-Chancellor, and it has been affirmed, that really after all that is only making those particular persons who are called trustees his agents or attorneys. There might be a power of attorney from him to realize all his property, and relieve him from the difficulties he was in. If it were supposed that such a deed as that created an absolute irrevocable trust in favor of every one of the persons who happened at the time to be a creditor, the result might have been very often monstrous. It would give him no opportunity of paying a creditor who was pressing; no opportunity of settling an action; no opportunity of getting any food for himself or his family the next day, or redeeming property pledged. So, where there was an actual conveyance on trust, it was held in Walwyn v. Coutts ("), that where it was for all the creditors it must be assumed from the very nature of the transaction, and from the position of the assignor, that it was a thing for his

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(1) 1 W. & T., 5th ed., 278.
(2) 2 K. & J., 18.
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<sup>(3) 2</sup> K. & J., 168.

<sup>4) 5</sup> E. & B., 367.

<sup>(5)</sup> Law Rep., 2 Q. B., 642.

<sup>(</sup>f) 15 Q. B., 713.

<sup>(</sup>¹) 5 Hare, 493. (8) 1 D. J. de S., 585,

<sup>) 8</sup> Sim., 1; 2 Russ. & My., 451.

<sup>(10) 8</sup> Mer., 707.

own benefit, and not for the benefit of numbers of persons whom the trustees would probably have no means of ascertaining, and whose debts the trustees would probably have no means of knowing. If you once assumed that this was an absolute trust in favor of every creditor, every person who had a right to claim to be a creditor, or had some demand against him, every one of those might have filed a bill, and the unfortunate trustee under those circumstances (who might have acted the part of a friend to the impecunious person) might have been liable to a thousand bills in chancery, for he could not stop any of them till a decree was made in favor of all the creditors.

Those are some of the reasons that appear to me to have led the court to say that such a deed as this is to be construed as a mandate, the same sort of mandate that a man gives when he gives his servant money, with directions to 750] pay it in a particular \*way; it does not create any equitable or legal right in favor of a particular creditor. The right to the direction of the money is the right of the person who has put the money in the hands of his agent or steward or whoever he may be. Walwyn v. Coutts (') laid that down as the law where the deed was for creditors generally. Garrard v. Lord Lauderdale (\*) only extended it to the case where the names of the creditors were scheduled, and the amounts due were scheduled, and that was held not to make any difference; and from that time to this I believe that has been the doctrine of the court. The deed itself does not create a trust in favor of all and every or any of the creditors. circumstances may have occurred, circumstances may have existed which did make the assignment a trust or an obligation in favor of some particular person. If the creditor has executed a deed himself, and been a party to it, and assented to it—if he has entered into obligations upon the faith of the deed, of course that gives him a right, just as in the case where a man receives money from a person, or a direction from his creditor to pay some other person instead of paying him, and he communicates it to this person. The person to whom he communicates it of course has a legal right to have the money so applied, but that does not enure for the benefit of any other person or persons to whom no such communication has been made. It seems to me that on principle you cannot create a right in A. where the deed has not given him a right, because something has occurred giving B. a right, who originally was in the same position as A. That was, in fact, the principle of the decision in Acton v. Woodgate(');

<sup>(1) 3</sup> Mer., 707.

<sup>(9) 2</sup> Russ, & My., 451.

<sup>(8) 2</sup> My. & K., 492.

for in that case, there being beyond all question a trust deed in favor of all the creditors, including certain post obit creditors, whom the settlor was afterwards minded not to put on the same footing as his other creditors, the settlor directed that they should be excluded from the benefit of the deed; and it was held by the court that it was perfectly in his power to do so, and the deed remained still as a deed to be executed in favor of all the creditors except the post obit creditors, and they were not cestuis que trust by the deed. It was called a partial revocation by Sir Henry Jackson. is not a \*case of revocation in one sense; you cannot [751 revoke the deed, and cannot get the property out of the hands of the trustee until, at all events, you have satisfied all the charges and expenses he has incurred, and any right he has acquired in the property. It is not a revocation of the deed, but it is a revocation of the directions given by the deed to the assignor's agent as to what he shall do with the proceeds. It appears to me that this is clearly a case of the same kind as Walwyn v. Coutts (1) and Garrard v. Lord Lauderdale ('), viz., the case of a creditor to whom no communication has been made, who has never been induced to act by anything that occurred by reason of the execution of this deed. I think there is no case which has been cited which in the slightest degree shakes the authority of Garrard v. Lord Lauderdale, as explained and acted upon in Acton. v. Woodgate (').

The authority upon which the Vice-Chancellor seems to have proceeded was the judgment of Lord Campbell, in the Court of Queen's Bench, in Siggers v. Evans ('); and there, when the case comes to be examined, and we see exactly what the point was and how it arose, it really has in my view no bearing whatever upon this question; because it was simply a question whether, where the trustee to whom the property was conveyed, and in whom the legal right to the property was vested was himself a cestui que trust or a person interested in the deed, an execution creditor was entitled under those circumstances to say that the whole thing was void as being a violation of the statute 13 Eliz., that there was no property conveyed to the trustee at all, and that therefore the execution creditor could take the property. That was the point raised there and the sole point determined, and I may say rightly determined; upon the principles laid down, which really have nothing to do with this case.

The other case, which seemed at first something like this

<sup>(1) 8</sup> Mer., 707. (2) 2 Russ. & My., 451.

<sup>(\*) 2</sup> My. & K., 492. (4) 5 E. & B., 567.

<sup>25</sup> Eng. Rep.

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case, was the case of Cosser v. Radford ('), but there there was a simple contract creditor who was allowed to sustain At first I thought it was on behalf of himself and all other the simple contract creditors, but it was expressly on behalf of himself and \*all other the creditors entitled to the benefit of the deed, and it so happened that he himself had executed the deed, and other simple contract creditors had executed the deed, and he had himself been communicated with and had received part payment in execution of the deed. Therefore, it was held that he and those persons who were in the same position as himself had entitled themselves to the benefit of the trust, and the sole thing determined there was that there was nothing in the subsequent clauses of the deed which deprived the plaintiff of the equity which he would have had but for those subsequent clauses.

I am of opinion that it is not desirable to draw nice distinctions between cases, and to say that Garrard v. Lord Lauderdale (\*) is good law, and only good law for the exact facts. It appears to me to be based upon very good common sense, and it is desirable that those cases that are substantially the same as Garrard v. Lord Lauderdale should receive the same decision. It is desirable that the law should be uniform, and that people should not be tempted to bring experimental new suits on minute differences of fact.

BAGGALLAY, L.J.: I am of the same opinion, and I am unable to distinguish this case (if we have regard only to those facts which we can properly regard) from that of Garrard v. Lord Lauderdale. The statement of claim sets forth a variety of deeds executed in the months of June and November, 1871, and the property was transferred for the purpose of being applied in payment of the debts of Meyrick, including the debt of the plaintiff. The plaintiff then commenced this action for the purpose of having the property included in those several deeds applied for the benefit of the creditors according to the terms of those deeds. stating the case so far is really stating facts which exactly agree with those in Garrard v. Lord Lauderdale. absence of any allegation upon the face of the statement of claim that the provisions of those deeds were acted upon or communicated to the various creditors or any creditors of Meyrick, it appears to me that there is no distinction whatever which can be drawn between the facts of this case and that of Garrard v. Lord Lauderdale.

753] \*This being by way of demurrer, we are bound by

<sup>(1) 1</sup> D. J. & S., 585.

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the statements which are to be found in the claim, and I am unable to find any statement whatever to the effect that those deeds, or any of them, were communicated to any of the creditors of Meyrick; and of course, if not communicated them were not cated when

they were not acted upon.

It has been suggested that one of the trustees—I call him a trustee because that term has been applied to him throughout the whole of the proceedings—one of the defendants would be perhaps the correct expression—was himself a I am unable to find any allegation on the face of this statement of claim to that effect. Then, if the facts which we can properly take into consideration are not distinguishable from those in Garrard v. Lord Lauderdale ('), how can we come to any other decision in the case than such a decision as that which was arrived at in that case? I entirely agree with the observation which fell from Lord Justice James as to the principle involved in Garrard v. Lord Lauderdale; and though, no doubt, some observations were made in 1845 by Vice-Chancellor Knight Bruce, and in 1849 by Vice-Chancellor Wigram, indicating disapproval of that case, thirty years have elapsed since the last of those dicta was pronounced; and Walwyn v. Coutts ('), Garrard v. Lauderdale, and Acton v. Woodgate (') have ever since been recognized and acted upon, and they were distinctly recognized and spoken of with approbation in the House of Lords by the Lord Chancellor and Lord Cranworth, in the year 1858, in the case of Montiflori v. Browne (1).

Bramwell, L.J.: I am of the same opinion. I agree with the reasons which were given by the Lords Justices; and the only observation I shall make in addition is, that I cannot think that the case of Siggers v. Evans (\*) calls for the conclusion that the learned Vice-Chancellor has come to. It seems to me that the case merely decided this—that the deed was not a void or voidable one, that is to say, one which the grantor could nullify by proceedings on the ground \*that no interest had been given. That is [754] all that that case decided, to my mind, and decided rightly enough, because it is manifest that Siggers, the grantee in that deed, had an interest given to him which he could have enforced until he had been satisfied in respect of it; and till then at least it would have been impossible for the grantor to have got rid of the deed or the trusts or obligations contained in it. Consequently that case is no authority for the

<sup>(1) 2</sup> Russ. & My., 451.

<sup>(</sup>²) 3 Mer., 707.

<sup>(8) 2</sup> My. & K., 492.

<sup>(4) 7</sup> H. L. C., 241.

<sup>(6) 5</sup> E. & B., 567.

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decision of the learned Vice-Chancellor. The demurrer must be allowed.

On the application of the counsel for the plaintiff leave was given to amend the statement of claim.

Solicitor for plaintiff: G. B. Norman. Solicitor for defendant: C. F. Millett.

See 17 Eng. R., 765 note; 18 Am. Law Reg. (N.S.), 387, Id., 401; 1 Weekly Jur., 1; 11 Cent. L. J., 161; 13 Alb. L. J., 362.

The principal case is not exactly the case of A. transferring property to B., in consideration whereof B. promises A. to pay a certain sum to C. on A.'s debt. The declaration alleged no promise by the assignee to the assignor to pay the plaintiff's debt.

The court seems to have regarded it

as a power to sell and apply the proceeds on debts which the debtor could revoke, until the creditors were in-formed of the arrangement, and it would seem assented thereto.

Where a debtor delivers to a third person money to pay to his creditor, the relation between the debtor and third person is that of principal and agent until the creditor assents to the transaction, and until such assent the debtor may revoke the intended appropriation.

Any disposition by the debtor, such as an assignment for the benefit of creditors inconsistent with the appropriation first intended, will be a revoca-The assent of the creditor to the deposit with the agent may be presumed when he has knowledge of it, but his knowledge of it will not be presumed: Simonton v. First Nat. Bank Minneapolis, 24 Minn., 216; Hardy v. Hunt, 2 Labatt (Cal.), 77; Bigelow v. Davis, 16 Barb., 561.

Where one accepts notes of another in trust to pay such person's debt, and agrees with the creditor to either turn over the notes to him, or when collected to pay him the money, and enters upon the performance of the undertaking, there will arise an obligation on his part to execute the trust faithfully, and an action lies in favor of the creditor for a failure to do so. He makes himself a trustee for the creditor even though he receives no compensation.

Where a person receives property,

and in consideration thereof agrees to pay a debt of the party, delivering the same to him, to a third person, the promise will not be within the statute of frauds: Walden v. Karr, 88 Illinois, 49.

Before a defendant can be held liable for money had and received to the plaintiff's use, it must appear clearly that there is money in defendant's hands actually belonging to the plaintiff.

If a debtor places money in the hands of a person for the purpose of being applied to the payment of debts, owing by such debtor, without setting apart the money in distinct amounts for his several creditors, so that he has no further control over it, one of the creditors cannot maintain an action against the party so holding the money for money had and received to the use of such creditor: Maxwell v. Lorgenecker, 82 Ills., 308; S. C., 2d appeal, 89 Ills., 102

The rule that if one party pay money to another for the use of a third person, or having money belonging to another, agrees with that other to pay it to a third, an action lies by the person beneficially interested, does not apply, when the contract is for the benefit of the contracting party, and the third person is a stranger to the contract and consideration; the action then must be by the promisee.

Where the contract leaves the promisor subject to a suit by the promises or his personal representatives, though third person beneficially interested, the latter cannot maintain an action: Guthrie v. Kerr, 85 Penn. St. Rep., 393, 5 Weekly Notes Cas., 458; Kountz c. Holthouse, 85 Penn. St. Rep., 235, 5 Weekly Notes Cas., 463; Bigelow c.

Davis, 16 Barb., 561.

Plaintiff employed defendant, an attorney, to collect a debt due to plaintiff from A., and authorized him to allow the amount in the transfer of a mortgage from A. to B., a creditor of the

plaintiff. He afterwards revoked the authority so to appropriate the amount, but the defendant nevertheless arranged the debt in the transfer of the mortgage: Held, that as the defendant had not received money or money's worth, he was not liable to the plaintiff in an action for money had and received: Neil v. Jack, 5 Allen, N. B., 237.

In this country, an action lies on a promise, made by the defendant, on a valid consideration, to a third person for the benefit of the plaintiff, although the plaintiff was not privy to the consideration. Such promise is to be deemed to be made to the plaintiff, if adopted by him, although he was not a party to nor cognizant of it when made.

Canada, Lower: Brisbin v. Campeau, 21 Lower Can. Jur., 167.

Illinois: Snell v. Ives, 85 Ills., 279. Indiana: Headrick v. Wisehart, 57 Ind., 129.

Kansas : Center v. McQueston, 18 Kans., 476; Kansas, etc., v. Hopkins, Id., 494; Schumeker v. Siebert, Id.,

104; Floyd v. Ort, 20 Kans., 162. Kentucky: Williams v. Rogers, 14 Bush, 776.

Michigan: Calkins v. Chandler, 36 Mich., 320; Donkersley v. Levi, 38 Mich., 54.

See Hunt v. Strew, 89 Mich., 868. Missouri: Wright v. McCully, 67 Mo., 184; Beardsley v. Morgner, 4 Mo. App., 139.

New Jersey: Heid v. Vreeland, 80

N. J. Eq., 591.

New York: Coster v. Mayor, 48

N. Y., 399, 411; Ayers v. Dixon, 9 Week. Dig., 141, Ct. Appeals; Melvain v. Tomes, 14 Hun, 31; Brown v. Curran, 14 Hun, 260; Douglass v. Cross, 56 How. Pr., 330; Haerlaem, etc., v. Mickelsburgh, 57 How., 106; Ranney v. McMullen, 5 Abb. N. C., 247; Hand v. Kennedy, 45 N. Y. Superior Ct. R., 385.

Pennsylvania: Justen v. Tallman, 86 Penn. St. R., 147; Peyton v. Samuel, 34 Leg. Int., 126, Com. Pleas.

Rhode Island: Urquhart v. Brayton, 12 R. I., 69; Merriman v. Social, etc., 12 R. I., 175.

See Dwyer v. Gaylord, 12 R. I., 263. Where several parties are liable to the mortgagee in different amounts, under their agreements with each other, an action can be maintained against them all, in equity, and a judgment rendered therein according to the facts established therein against them: all according to their joint or several liabilities: Hand v. Kennedy, 45 N. Y. Superior Ct. R., 385.

A. owed B. a sum of money; C. promised B. that if he would give time he, C., would see B. paid, alleging that he had funds in his hands belonging to A. B. agreed not to push, but did not give up his claim against A., and subsequently reduced it to judgment:

Held, that C.'s promise was not within the statute of frauds, and could be enforced.

Held, further, that C. was estopped from denying that he had property of A. in his hands.

When the promise is to apply property of the debtor in the hands of the party, it is not necessary that the creditor should give up his recourse against the debtor upon the original claim. The promise is not a collateral, but an original one, founded on sufficient consideration: Dock v. Boyd, 8 Weekly Notes Cas. (Penn.), 138.

In an action by the assignee of a mortgage against a grantee of the mortgaged premises upon a covenant in his deed to pay the mortgage, the complaint alleged the execution of the mortgage by P., defendant's grantor, that it was given to secure a part of the purchase price of the mortgaged premises, and that at the time it was executed, P. was the owner in fee. These facts were admitted in the answer. Held, that in the absence of a demurrer, or of a motion on the part of defendant to make the complaint more definite and certain, or of any specification of any defect on the trial, the complaint might be construed, for the purpose of upholding the judgment, as inferentially averring that the mortgage was given for a debt owing by P., and for which he was personally liable: Thayer v. Marsh, 75 N. Y., 340.

A promise for a valid consideration by A. to B. gives no right of action to C., he being neither privy to the contract nor to the consideration, unless it was made for his benefit, and he was the party intended to be benefited. The fact that a benefit would enure to him from the performance is not sufficient: Simson v. Brown, 68 N. Y., 355.

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M. assigned to plaintiff a bond and mortgage to secure \$500 executed to him by B. B., without notice of the assignment, paid the bond to M. M. thereafter executed a bond to B. in the penal sum of \$1,000, conditioned that if the obligor pay to plaintiff the amount of the bond and mortgage and save B. harmless therefrom, the bond should be void. Defendant guarantied the pay-ment of the bond. In an action upon ment of the bond. the guaranty, the court found that the bond was made and guarantied for the purpose of securing to plaintiff the amount unpaid to him. Held, that if this was to be considered as a finding that the bond was given and guarantied for the benefit of plaintiff, it was not sustained by the evidence, and that the action could not be maintained, as the obligation was not to pay to plaintiff but to B., and the condition was not a promise but an alternative for the benefit of the obligor, providing a way by which he might be discharged from his obligation: Simson v. Brown, 68 N. Y., 355; Hoffman v. Schwacher, 33 Barb., 194.

A. contracted to sell land to B., and then for a valuable consideration assigned his contract with B. to C. B. subsequently paid C. the contract price, but A. refused to convey the land to him:

Held, that B. could not maintain an action against C. for breach of contract, nor on any implied liability arising from failure of consideration, unless C. contracted with A. to fulfil the contract.

Held, further, that if C. was a purchaser for value, the fact that both B. and C. believed that A. had title to the premises, although in fact he did not, would not enable B. to recover the money paid to C. as money paid under a mutual mistake of fact.

That B.'s remedy was against A. for breach of contract, if, after a demand, he failed to give a good and sufficient conveyance of the premises: Youmans v. Edgerton, 16 Hun, 28.

Defendant made a contract with certain third parties, by which he agreed to purchase of them the bonds of a certain railroad at a fixed price, which said contract also contained a proviso that all holders of said bonds who had registered them, etc., should have the option of accepting the same price and

terms upon which the sale and purchase of the bonds sold to the defendant was made. Plaintiff being the holder of some of such registered bonds, notified defendant of his election to sell them at the contract price, and tendered the bonds. Defendant refused to accept or pay for them. In an action to recover damages for such refusal; held, that the plaintiff had no rights under the contract, and could not avail himself of its provisions as being a holder of the registered bonds: Johnson v. Morgan, 6 Daly, 333.

Where there was a stipulation in a deed, absolute on its face, but in reality a mortgage, that the grantee assumed and agreed to pay a prior mortgage on the premises, and it appeared, as well by the defeasance as otherwise, that the grantee was not in fact, as between him and the grantor, liable upon the assumption, the latter having in the defeasance itself covenated to pay the principal and interest of the mortgage in question, thereby indemnifying the grantee against the assumption: Held, that the grantee was not liable on the assumption to the prior mortgage : Arnaud v. Grigg, 29 N. J. Eq., 482.

One Gaylord was the owner of certain real estate in the city of Rochester valued by him at \$80,000, which was subject to two mortgages of \$20,000 each, and other incumbrances amounting to about \$10,000. He was also indebted to the plaintiff to the amount of \$5,000, and was defending an action brought by the plaintiff for its collec-Being apprehensive of banktion. ruptcy proceedings, he withdrew his answer, allowed the defendant to take judgment, and conveyed the property to him by a deed with the consideration expressed therein of \$54.689 (the amount of the incumbrances). deed contained a covenant, by which the defendant assumed and agreed to pay all the incumbrances and liens on the property conveyed thereby. The defendant at the same time agreed with Mrs. Gaylord to sell the property to her at the consideration expressed in the deed, on a day named, and she agreed to then pay him the said sum therefor.

Held, that the transaction was in fact a mortgage, and not a conditional sale.

That, as under any circumstances, the

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defendant would have a fund wherewith to pay the incumbrances (either the real estate or the consideration named in the deed), he was personally liable to the holders thereof on his covenant in the deed: Pardee v. Treat,

18 Hun, 298.

H. executed and delivered to B. a deed of certain premises upon which was a mortgage executed by H., held by plaintiff; the deed recited the deduction of the amount of the mortage from the purchase price, and contained a covenant on the part of the grantee to pay the same. The name of the to pay the same. grantee was left in blank, with authority to B. to insert the name of any per-B., being indebted to a firm of which defendant was a member, agreed with the latter to insert his name in the deed, and that any profits which might be made should be applied on the firm debt; defendant subsequently conveyed the premises. Plaintiff foreclosed without making defendant a party. In an action brought upon the covenant in the deed to recover a deficiency arising on foreclosure, held that the defendant, by consenting to the insertion of his name as grantee and accepting the deed, occupied the position of purchaser, with all the rights and obligations incident to that position as between him and the grantor, and plaintiff was entitled to enforce the covenant against him; that the arrangement with B. did not impair the right of H. or of plaintiff; it was collateral to the deed, and only affected the parties to it: Campbell v. Smith, 71 N. Y., 26, distinguishing Garnsey v. Rogers, 47 N. Y., 233.

A promise to pay the pre-existing debt of another, founded upon the original liability, and without any new consideration to support it, is a collatteral undertaking and within the statute of frauds. And the mere possession, by the promisor, of property not deposited for the purpose of paying the debt, will not withdraw it from the operation of the statute: Hughes v.

Lawson, 81 Ark., 613.

An obligation amounting to an assumption of a mortgage cannot legally be created without a writing. A verbal agreement to pay a mortgage made by a third party is void by the statute of frauds: Goelet v. Farley, 57 How.

Pr., 174; Berkshire v. Young, 45 Ind., 461.

But see to contrary, Urquhart v. Brayton, 12 R. I., 169; King v. Shoemaker, 1 Pearson (Penn.), 206; Headrick v. Wisehart, 57 Ind., 129; Taintor v. Hemmingway, 18 Hun, 458; Pike v. Seiter,

15 Hun, 402.

Where the owner of land, subject to an over due mortgage made by a former owner, made an oral agreement with the holder of the bond and mortgage to the effect that if he would extend the time of payment and forbear to foreclose, he would pay him the amount of certain interest on the bond, partly then due and partly to become due within the extended time: Held, that the agreement was not void under the statute of frauds, as a promise not in writing, to answer for the debt or default of another, but was an original and valid agreement, on a new and sufficient consideration: Prime v. Kochler, 7 Daly, 845, disapproving Doolittle v. Nayler, 2 Bosw., 206.

A verbal promise to pay the debt of another is within the statute of frauds, and void if made to the creditor; but

not if made to the debtor.

A man promised certain stockholders to pay the debts of the corporation, in consideration of which they transferred some of their stock to him. They were not liable themselves, and were interested only as stockholders. Failing to pay a certain debt, he was sued in assumpsit by the creditor upon an assignment of this agreement. Held that the action did not lie, since nothing was assigned but the damages resulting to the stockholders from the non-payment of that one debt, and their interest could not be ascertained in a court of common law, nor severed from the entire transaction.

The measure for damages for failure to pay the joint obligations of others, is the whole amount of the debts: Pratt

v. Bates, 40 Mich., 87.

The plaintiff held the over due notes of A. secured by a mortgage of personal property, which contained a clause forbidding the sale of the property by the mortgager without the consent of the mortgagee. The defendant requested the plaintiff to consent to a sale by A. to B., subject to the mortgage, B. agreeing to pay the mortgage to the plaintiff,

and the defendant agreeing replaintiff such portion of the mortgage plaintiff such portion of the mortgage. This and the defendant agreeing to pay the promise was made by the defendant in order to secure the payment of a debt due from A. to him, which B. then assumed and agreed to pay. Held, that the agreement of the defendant was a promise to pay the debt of another, within the statute of frauds: Richardson v. Robbins, 124 Mass., 105.

If parties purchase goods on their own credit, and another party verbally promise to pay the debt, it will not take the case out of the statute of frauds that the promisor had, at the time, under his control sufficient assets of the purchasers to pay the debt: Murphy v. Renkert, 12 Heisk., 397.

Defendant being a creditor of the firm of W. & McV., who were engaged in running a saw-mill, entered into an agreement with that firm, in which he agreed, in substance, to take their mill, saw up the logs, market the lumber, and apply the net proceeds to the payment of his own and other debts, among them a debt due from said firm to plaintiff for work. In an action to recover the amount of said debt, plaintiff's evidence was to the effect that defendant told him to keep on working at the mill and he would pay him at the same rate W. & McV. had been paying; that he had bought the stock and had agreed to pay him (plaintiff) what was due him, and if he would keep on working for him (defendant) he would pay him for his work, and in a day or two would pay \$1,000 upon the amount due; that plaintiff went on and worked for defendant, but the latter had failed to pay the indebtedness of W. & McV At the time of the commencement of the action defendant had disposed of about half of the lumber. Held that plaintiff was not entitled to recover; that the promise to work at what appeared to be a full compensation, furnished no consideration for the promise to pay the debt of W. & McV.; and that said promise was void under the statute of frauds.

The judge charged that if the jury were satisfied that defendant agreed to pay the \$1,000 as testified to by plaintiff, he could not recover, upon the theory that the property having been put into defendant's hands for sale, to pay the debts specified, he would be liable to pay plaintiff after he had disposed of it, and hence could waive delay and be bound by his promise to pay before he had realized the proceeds: Held, error: that there was no consideration to uphold such a promise, which, if valid, imposed an entire new obligation, as it bound defendant to pay whether he realized sufficient from the sale or not. It seems, that even if the promise had been made after defendant had converted the proceeds of the property, it could have been enforced against him only to the extent of the share of such proceeds applicable to plaintiff's debt: Belknap v. Bender, 75 N. Y., 446, distinguishing Lawrence v. Fox, 20 N. Y., 268; Mallory v. Gillett, 21 N. Y., 412; Fullam v. Adams, 37 Vt., 391; Young v. French, 35 Wisc., 111.

J. L. P. & Co. and plaintiffs entered into two contracts, by which the former was to purchase, and the latter to sell, a quantity of oil at a specified price, deliverable at plaintiffs' option during the year 1867. J. L. P. & Co. sold and assigned the contracts to defendant, of which plaintiffs had notice. The market price of oil having fallen, plaintiffs and J. L. P. & Co. entered into an agreement by which, in consideration of the plaintiffs agreeing to release them from all liability, J. L. P. & Co. agreed to pay \$2,500 in cash, and to give plaintiffs "all over this sum that shall be realized from defendant on said contracts. money, to make the payment specified, was furnished by defendant. Plaintiffs tendered to defendant the oil and demanded payment, which was refused. In an action to recover the difference between the contract price and the market price at the time of the tender, held that there was no such privity between the parties as rendered defendant liable to plaintiffs for breach of the contracts; that the effect of the transfer was to create an implied contract on the part of defendant to indemnify J. L. P. & Co., and the latter having been released from liability, this was a final adjustment of the contracts: Clark v. Dickinson, 74 N. Y., 47, distinguishing Holmes v. Weed, 19 Barb.,

Where one buys from an attachment debtor, after an attachment is sued out but before it is actually levied, promises that he will pay the attaching creditor's claim, the promise does not render the property liable to execution, even if it places the purchaser under a percreditor is a stranger to it and cannot take the property: Hunt v. Strew, 39 Mich., 368.

In some of the states it is held that if A. owe B. and agree with B. to pay his debt to C., the latter cannot sue A.

Massachusetts: Prentice v. Brimhall, 123 Mass., 291.

See Richardson v. Robbins, 124 Mass., 105.

An incoming partner is not liable for the debts incurred or contracts made before he entered the partnership, unless such liability is created by express contract based on good consideration. There must be a novation before the new firm is liable; and the new con-tract must receive the consent of all the parties, and must have the effect to extinguish the old contract and create a new liability of debtor and creditor, or of contractors between the creditor or contractor and the new firm. and such new contract must be based on some consideration.

The mere receipt of money by the new firm is not sufficient to raise a presumption that the incoming partner made a parol contract, binding him to fulfil the terms and conditions of such former contract, or to make him liable for a breach of the same: Parmalee v.

Wiggenhorn, 6 Neb., 822.

An association having issued bonds, some of which were as collateral security in the hands of its creditors, a corporation, adopted a resolution whereby it assumed the payment of the bonds, provided that stock was issued to the corporation by the association to the amount of said assumption of payment by said corporation as the said bonds were paid. Held, that a holder of the bonds is not in such privity with the corporation, nor has he such interest in the contract between it and the association, as to warrant a suit in his own name to compel the corporation to pay the bonds: National Bank v. Grand Lodge, 98 U. S. R., 123. Where the plea of infancy is inter-

posed and maintained by one of two defendants, it cannot avail the other defendant as to whom the contract

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sued on is valid and binding.

25 Eng. Rep.

An agreement by the holder of a promissory note to take a claim which the maker holds against a third person, in payment thereof, without any consideration being shown for such prom-

ise, is not binding

Where the holder of a promissory note agrees to take a claim held by the maker against a third person, in payment of the note, it is necessary to the validity of such agreement that such third person should be a party to such agreement, and promise to pay what he owes the maker of the note to the holder thereof: Reid v. Degeuer, 82 Ills., 508.

A debtor is not released by the fact that his creditor knows that a third person has engaged to pay the debt, unless the creditor has accepted such third person as debtor in his place: Blanchard v. Tellabawassee, 40 Mich.,

Defendant was indebted to A., who transferred his business and the debts due him to the plaintiff. The defendant afterwards, with knowledge of the transfer, dealt with the plaintiff, who rendered him accounts, charging him the original debt and the subsequent transactions as forming part of the same account; the defendant made payments from time to time, and promised the plaintiff to pay the whole of the account. Held, that the defendant's debt to A. was thereby extinguished and transferred to the plaintiff, and that he was justified in applying the payments made, to the balance due on A.'s debt: Esson v. Dunn, 5 Allen, N. B., 417.

The plaintiffs had a claim for \$7,000 for money lent against a joint stock A new corporation was corporation. formed which took its business and assumed its liabilities, but the subscription to its stock were not to be binding unless \$250,000 was subscribed within certain time. The time being to expire and the subscriptions falling \$30,000 short, B., who was already a subscriber, agreed, upon the solicitation of the other subscribers, to take the remaining \$80,000 on their signing a bond of indemnity, which bond was signed by twenty-one of the stockholders, and the subscription thereupon made by him. Afterwards the plaintiffs demanded of the new company payment of the \$7,000, and were about to sue, when it was arranged that B.

should give them his own note for \$7,000, with a guarantee on the back of it signed by the defendants, who were seven of the twenty-one signers of the bond of indemnity, which arrangement was carried out. Held, that general assumpsit for money had and received would not lie in favor of the plaintiffs against the guarantors of B.'s note.

The ground on which a promissory note is evidence under the general counts is, that it is presumed that money has been received by the maker. But the guarantee of the defendants created no such presumption, and held, that it could not be shown by parol that the defendants, though in form guarantors, in fact undertook thereby to obligate themselves to pay the note:

Nor that they made at the time a verbal promise to pay the debt; and that any promise made by the defendant at any time to pay the debt would be without consideration:

And held, that the doctrine of novation did not apply, inasmuch as the defendants did not owe the corporation, and were not, therefore, applying their own debt to the payment of the indebtedness of the corporation.

A novation does not create a new indebtedness, but simply applies an existing indebtedness in payment of a debt of the creditor, and it is a necessary incident of the transaction that the original indebtedness to the intermediate creditor, and his indebtedness to his own creditor, should be discharged.

In this case the \$7,000 for which B. gave his note to the plaintiffs, with the guarantee of the defendants, had been credited on B.'s subscription of \$30,000 to the stock of the new company; but this was done by the financial agent of the company of his own accord, and with no authority from B.: Held, not to bring the case within the law of novation: Allen v. Rundle, 45 Conn., 528.

Where a deed recites that a grantee takes "under and subject" to a mortgage debt, and there was no agreement nor consent on his part to pay said debt or make it his own, he is merely a dry trustee and not personally liable for the mortgage debt: Fisher v. Tolman, 26 Am. R., 659, 660 note.

Massachusetts: Fisher v. Tolman, 124 Mass., 254, 26 Am. R., 660 note.

Michigan: Winans v. Wilkie, 41 Mich., 264.

Pennsylvania: Girard, etc., v. Stewart, 86 Penn. St. R., 89; Stokes v. Williams, 6 Weekly Notes Cas., 473; Moore's Appeal, 88 Penn. St. R., 450; Samuel v. Peyton, 88 Penn. St. R., 465, 6 Weekly Notes, 476; Thomas c. Wiltbank, 6 Weekly Notes, 477.

Tennessee; Moore v. Stoval, 2 Lea, 543.

A mere covenant by the purchaser of a mortgaged estate to indemnify his vendor, does not make it his personal debt: Moore's Appeal, 88 Penn. St. R., 450, 6 Weekly Notes, 474.

Defendant executed to plaintiffs a bond and mortgage upon premises owned by him in the usual form, containing, however, no covenant for the payment of taxes and assessments. Subsequently he conveyed the premises, the grantee assuming and agreeing to pay the mortgage. Thereafter the grantee paid the interest accruing on the mortgage, and continued so to The premises, do after its maturity. after the maturity of the mortgage, became incumbered by taxes and assessments. In an action to foreclose the mortgage, and hold defendant liable on his bond for any deficiencies, held that he was not bound to pay taxes and assessments upon the premises after his conveyance, and that it was an error in determining the deficiency with which defendant was to be charged, to deduct their amount from the proceeds arising upon the sale: Marshall v. Davies, 16 Hun, 606.

Though where the grantee "assumes and agrees to pay" the mortgage debt, he is personally liable to the creditor therefor: Fisher v. Tolman, 26 Am. R., 659, 660 note; Thomas on Mortgages, 185 et seq.

Missouri: Fitzgerald v. Barker, 4

Mo. App., 105.

New York: Cashman v. Henry, 75 N. Y., 103; Ayres v. Dixon. 9

Weekly Dig., 141, Ct. Appeals: Ranney v. McMullen, 5 Abb. N. C., 247.

In such case the grantor cannot sue the grantee on the agreement. If he is obliged to pay the debt, he may then sue and recover what he has been obliged to pay: Ayres v. Dixon, 9 Weekly Dig., 141, N. Y. Ct. Appeals; Golden v. Knapp, 41 N. J. Law, 215.

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The mortgagee may sue the mortgagor upon his bond, and the mortgagor cannot force him to proceed against his grantee or the land: Marshall v. Miller, 59 How. Pr., 231, Ct. Appeals.

An action was brought to foreclose a mortgage, dated January 2, 1865, executed by S. W. Gregory to Noyes P. Gregory, and by the latter assigned to the plaintiff. After the assignment the mortgagor conveyed the premises covered by it, by a deed containing covenants of warranty, "except as against the five certain mortgages upon the above premises, mentioned and described in a certain agreement." By this agreement the grantees agreed to pay "the amounts remaining unpaid upon the following mortgages: \* A mortgage executed by Silas W. Gregory to Noyes P. Gregory, dated on or about the 2d of January, 1865, now owned by Louisa D. Haile," and an additional mortgage collateral thereto. The defence was, that the mortgage had been paid before its assignment to plaintiff.

Held, that by the deed and agreement, the grantees were estopped from denying the existence and validity of the mortgage: Haile v. Nichols, 16 Hun, 37.

See Real Estate, etc., v. Balch, 45 N. Y. Superior Ct. R., 528. Where a husband purchased land

Where a husband purchased land incumbered by a mortgage, and directed that the deed be made out in the name of his wife, he intending to make her a gift of the land; the deed contained a covenant on the part of the grantee to pay the mortgage; the wife was, however, ignorant of the transaction, and had no knowledge of the deed or its covenant; it appearing that the husband paid, with his own funds, the consideration on the purchase, and in like manner discharged the taxes and assessments: Held, that the wife, on a foreclosure of the mortgage, was not liable for any deficiency arising on the sale.

Although a married woman may enter into engagements with respect to her separate estate, there is nothing in the marital relation which authorizes a husband, without his wife's knowledge or assent, to create an estate in lands in her, and charge her personally with a covenant in respect thereto: Munson

v. Dyett, 56 How. Pr., 883; Culver v. Badger, 29 N. J. Eq., 74.

Defendant Seiter entered into a written agreement, by which he agreed to purchase certain real estate and to pay therefor \$34,000, part in cash and part by assuming the payment of a mortgage on the premises, for the foreclosure of which this action was brought. By the request of Seiter, the deed was made to his wife. Upon appeal from a judgment in this action, holding Seiter liable for any deficiency, held that the agreement of Seiter to pay the mortgage enured to the benefit of the owner thereof, and that his liability was not affected by the fact that, at his request, the deed was made to his wife: Pike v. Seiter, 15 Hun, 402.

One P. executed to defendant a mortgage upon certain premises; defendant agreed, by parol, to pay two former mortgages on the premises, and, after deducting the amount thereof, paid to P. the balance secured by his mortgage. P. subsequently sold and conveyed the premises to plaintiff, with covenant of warranty, subject to defendant's mortgage. In an action to compel defendant to pay and cancel of record the prior mortgages, or to have the amount thereof indorsed upon his mortgage; held, that plaintiff was not entitled to recover; that he could not recover upon the theory that defendant's promise was made for his benefit, as, at the time it was made, he had no relation to or interest in the lands; and the plaintiff's deed did not operate as an assignment to him of P.'s interest in the agreement.

It seems, that upon payment of the prior mortgages, plaintiff would be entitled to be subrogated to the remedy of the mortgagee, and could maintain an action against defendant upon the agreement: Miller v. Winchell, 70 N. Y., 437.

See also Comstock v. Drohan, 71 N. Y., 9.

If the grantor, to one assuming a mortgage, is obliged to pay a deficiency he may recover it, and the grantee is not entitled to deduct the costs of the foreclosure: Comstock v. Drohan, 71 N. Y., 9.

Where a party, by deed, assumes the payment of a mortgage executed by his grantor, he becomes the principal debtor, and the relation created

between him and his grantor is that of Such deed is principal and surety. notice to a subsequent holder of the mortgage of this relation, and an extension of the time of payment by such holder, even with the express understanding that the bond and mortgage shall remain in every other respect unaffected by said agreement, when made without the consent of such grantor, discharges him from all liability to the holder of the mortgage: Calvo v. Davies, 8 Hun, 222, affirmed 73 N. Y., 211. overruling Perkins v. Squires, 1 Thomp. & Cooke, 620; Ranney v. Mc-Mullen, 5 Abb. N. C., 247; Ayres v. Dixon, 9 Weekly Dig., 141, N. Y. Ct. of Appeals; Mutual, etc., v. Davies, 44 N. Y. Superior Ct. R., 172; Comstock v. Drohan, 71 N. Y., 9; Paine v. Jones, 14 Hun, 577, 76 N. Y., 274, overruling Myer v. Lathrop, 10 Hun, 66; Marshall v. Miller, 58 How. Pr., 231, Court Appeals.

Conveyance by a grantee, who has assumed a mortgage, to a subsequent grantee, who also assumes it, does not impair the rights of the mortgagor, as a surety, to have the grantees regarded as the primary debtors, and the land as the primary fund from which the debt is to be paid. It gives him the additional advantage of the subsequent assumption: Mutual, etc., v. Davies, 44 N. Y. Superior Ct. R., 172.

The mere assumption of a mortgage by a decedent is not such proof of an intention to make the debt his own, as renders his personal estate primarily liable therefor; and dower must be assigned therefrom, subject to the mortgage: Campbell v. Campbell, 30 N. J. Eq., 415.

Where the grantor in a deed is not

Where the grantor in a deed is not himself liable to pay a mortgage upon the land, his grantee is not liable to pay the same to the holder thereof, although by the conveyance to him he assumes its payment. A promise to pay an incumbrance, of which the holder can take advantage, must be made to one who is liable to pay.

New Jersey: Norwood v. DeHart, 30 N. J. Eq., 412.

New York: Munson v. Dyett, 56 How. Pr., 330; Vroman v. Turner, 69 N. Y., 208, reversing in part 8 Hun, 78.

Pennsylvania: Samuel v. Peyton, 88 Penn. St. R., 465, 6 Weekly. Notes, 476. The grantee who assumes and agrees to pay a mortgage cannot defend on the ground that his grantor could have defended under the statute of limitations: Schumeker v. Siebert, 18 Kans., 104. A married woman may, under the

A married woman may, under the statutes as they now exist (chap. 200, Laws 1848; chap. 375, Laws 1849; chap. 90, Laws 1860; chap. 172, Laws 1862), and as incident to the right to acquire property and hold it to her sole and separate use, purchase property upon credit and bind herself by an executory contract to pay the consideration money; and any obligation entered into by her, given to secure the purchase price of property acquired and held for her separate use, may be enforced against her the same as if she was a feme sole; and this, although she had no antecedent estate to be benefited, and although the purchase was not made for the purpose of a trade or business.

Where, therefore, a married woman as grantee, by the terms of her deed, assumed and agreed to pay a mortgage upon the premises conveyed as part of the consideration of the conveyance, held that she was personally liable to pay the mortgage debt; that a grantee from her, who in the same manner assumed and agreed to pay said debt, was also liable; and that in an action for the foreclosure of the mortgage, a judgment against him for a deficiency was proper: Cashman v. Henry, 75 N. Y., 103, reversing 44 N. Y. Superior Ct. R., 93, 55 How., 234, and practically overruling Slausin v. Watkins, 44 N. Y. Superior Ct. R., 73.

In 1856, one Howell purchased certain lands upon which there were then two mortgages, one for \$5,500, and the other for \$1,800. The payment of the first mortgage was assumed by Howell in his deed, but no reference was made therein to the second. In 1857, the second mortgage was foreclosed, the summons being served on Howell by publication. Upon the sale, the owner of the second mortgage purchased and took possession of the land, paid taxes and subsequently satisfied the first mortgage. Thereafter the premises were conveyed to various persons, and finally by a deed with covenants of warranty, etc., to the defendant, Clara B. Leavitt, a married woman, who bought them subject to a \$15,000 mortgage, given by one of her grantors, of

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which she assumed the payment. appeared that llowell was dead at the time it was attempted to serve the summons on him by publication. In November, 1878, the heirs of Howell. brought an action of ejectment against the defendant Leavitt, and recovered a

judgment therein by default.

In this action, commenced in December, 1878, to foreclose the \$15,000 mortgage and hold the said Clara B. Leavitt liable for any deficiency, she denied her liability therefor, on the ground that as no title passed to her from her grantor, there was no consideration for her covenant to assume the mortgage : Held, that she was in possession of the premises as a mortgagee in possession. That being so in possession, the heirs of the mortgagor could not maintain ejectment against her.

That the evidence as to the action of ejectment was to be entirely disregarded

in the present action.

That her right to sue on the covenants of title, contained in the deed from her grantor, was sufficient to uphold her covenant to pay the mortgage: Dunning v. Fisher, 20 Hun, 178. A mortgagee cannot avail himself of

an assumption of a mortgage inserted in a deed of the premises by the mistake of a scrivener in copying the grantor's deed-neither of the parties to the deed intending or being aware of it: Stevens, etc., v. Sheridan, 30 N. J. Eq., 23.

A mortgagee can derive no advantage from a covenant of assumption in a deed, if the covenant be invalid between the parties to the deed, e.g., where there was no agreement for assumption; and though the deed contained the covenant, and was delivered, the covenant escaped the notice of the grantee, it being inserted in an unusual place in the deed: Bull c. Titsworth, 29 N. J. Eq., 78.

Where it clearly appears that a clause inserted in an agreement is contrary to the agreement pursuant to which the instrument was given, and contrary to the intention of the parties to the agreement, and was inserted in the instrument through the mutual mistake of all the parties thereto, and the party on whom the clause imposes a liability satisfactorily accounts for his non-discovery of its insertion, the instrument may be re-formed by striking out the clause, unless an estoppel has arisen in favor of a third party.

Where, after the purchase of a mortgage, the mortgaged premises are conveyed subject to the mortgage which the grantee, by the deed, assumes and covenants to pay, such grantee is not estopped from insisting, as against such purchaser, that he is not liable under the covenant: Real Estate, etc., v. Balch, 45 N. Y. Supr. Ct., 528.

In this action, brought to foreclose a mortgage, it was sought to hold the defendant Burdick personally liable for any deficiency under a covenant contained in the deed to her, by which she assumed the payment of the mortgage. She interposed an answer alleging that she had agreed to purchase the interest of her grantor, Martin, in the premises, subject to the mortgage, but had never agreed to assume or pay the same; that the covenant had been inserted in the deed without her knowledge or consent, and was in violation of the terms of her agreement with Martin; that the conveyance was prepared by Martin, and that he caused the said covenant to be inserted therein for the purpose of charging her personally with the mortgage, knowing that it was not in accordance with the agreement, and for the purpose of injuring and defrauding her, and to relieve him-self from liability therefor; that relying upon the honesty of the said Martin, and believing that he had drawn the deed in accordance with the agreement, the deed was not carefully examined when received and recorded by the defendant's agent, and that the inserting of the said covenant therein was not discovered by the defendant until shortly before the commencement of this action. She sought to have the conveyance re-formed, by striking out the said covenant. Held, that the facts stated in the answer did not justify a re-formation of the conveyance on the ground of mutual mistake, as it was alleged that Martin intentionally caused the covenant to be inserted therein.

That the facts stated did not authorize the granting of the relief sought on the ground of fraud, as the only reason given for the non-discovery of the covenant at the time of the delivery of the deed was the failure of the defendant, or her agent, to examine it,

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Barratt made the bets, and the horses lost the races. races. Lister then applied to Barratt to advance him the money to pay the bets to the winners, and to pay them for him, and Barratt paid the bets accordingly in the settlement at Tat-Lister gave Barratt two promissory notes for £650 each, which represented the greater part of what Barratt had paid for him. The promissory notes were not paid,

and Lister was adjudicated a bankrupt.

Barratt tendered a proof in the bankruptcy for £1,328, 755] which \*sum he deposed that Lister owed him "for money lent by me to him, and also for money paid by me for his use at his request," and stated that he had received no satisfaction or security for the debt except the two promissory notes. The trustee rejected the proof, on the ground that there was no consideration for the promissory notes, and that the transactions for which they were alleged to have been given were illegal. The Registrar ordered the

proof to be admitted. The trustee appealed.

L. E. Pyke, for the appellant: This is a debt for an "illegal consideration" within the meaning of the act 5 & 6 Will. 4, c. 41 ('), and therefore the proof cannot be admitted. The promissory notes were given to secure a gaming debt. Horse racing is a game within the statute of Anne: Blaxton v. Pye('); Applegarth v. Colley('). The latter case also shows that the effect of 5 & 6 Will. 4, c. 41, is to make, not

only the security, but the contract itself, illegal.

[Winslow, Q.C., referred to Bubb v. Yelverton ('); Oulds

v. Harrison (\*).]

The act 5 & 6 Will. 4, c. 41, was not cited in Ould v. Har-756] rison (\*), \*and the decision was upon a plea framed

(1) The act 5 & 6 Will. 4, c. 41, contains a recital of the act 9 Anne, c. 14, whereby it was enacted that "all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever given, granted, drawn, or entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice, tables, tennis, bowls or other game or games whatsoever, or by betting on the sides or hands of such as did game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any per-

son or persons so gaming or betting as aforesaid, or that should, during such play, so play or bet, should be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever," and repeals so much of that act "as enacts that any note, bill, or mortgage shall be absolutely void," and enacts instead that "Every note, bill, or mortgage, which, if this act had not been passed, would," by virtue of the recited act, "have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration."

(\*) 2 Wils., 809. (\*) 10 M. & W., 723. (\*) Law Rep., 9 Eq., 471.

(5) 10 Ex., 572.

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with reference to the act 8 & 9 Vict. c. 109. In the present case the money was lent for the purpose of betting, and the act of Will. 4 clearly applies.

[JESSEL, M.R.: The money was not lent to enable the bankrupt to make a bet; it was lent to enable him to pay a bet which he had already made and lost.]

Hay v. Ayling (') applies.
[Bramwell, L.J.: There a bill of exchange was accepted. for a lost bet, not for money lent by some one else to pay it.] But that case shows that the act applies after the bet has been made and lost. Hill v. Fox (\*) is in point.

[JESSEL, M.R.: The question left to the jury there was, whether there had been a colorable evasion of the statute.] The authority given to make the bet did not include an authority to pay it when lost. Excessive gaming was illegal at common law: Rex v. Rogier (\*). At any rate, the principle of Higginson v. Simpson (\*) applies.

Winslow, Q.C., and Yate Lee, for Barratt, were not heard. JESSEL, M.R.: I am of opinion that the appeal must fail. We must see what the meaning of the act really is. facts are few and simple. Lister employed Barratt as his agent to back some horses which were to run in some races. The horses lost the races, and consequently Lister became liable as a debt of honor to pay the winners of the bets. He requested Barratt to lend him the money to pay the bets. Barratt did so, and paid the debts, and for part of the money which he thus advanced he took promissory notes from Lis-Lister became bankrupt, and Barratt claimed to prove, and has been allowed by the Registrar to prove, in the bankruptcy, not upon the notes, but for money lent to Lister and paid for his use at his request. There could be no answer to such \*a claim, unless the debt thus arising is made [757] void by some statute. It is said that the act 5 & 6 Will. 4, c. 41, has that effect. The question, therefore, is whether the money thus lent by Barratt was "knowingly lent or advanced for gaming or betting." In my opinion it was not. When you look at the act it is clear that what it means is money lent to carry out the illegal purpose of gaming or betting. If a number of men are round a gaming table, and one of them asks another to lend him money to game with, and he lends the money, that is money "lent for gaming" within the meaning of the act. And so also, if money is lent to a man to enable him to make a bet, that is money "lent for betting." That this is what the act really contemplates,

<sup>(1) 16</sup> Q. B., 423. (2) 4 H. & N., 359.

<sup>(\*) 1</sup> B. & C., 272. (4) 2 C. P. D., 76.

<sup>25</sup> Eng. Rep.

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is shown by the words which immediately follow, "lent or advanced at the time and place of such play to any person or persons so gaming or betting." The object of the act was to prevent gaming or betting from taking place, to deter people from committing the illegal act. But in the present case the mischief had been completed, the illegal act had been carried out, before the money was lent. The money was advanced to enable the borrower to pay the debts which he had already made and lost, which seems to me an entirely different thing from a loan of money to enable a man to make a bet. In the case of Alcinbrook v. Hall ('), which was an "action upon an assumpsit, for money paid by the plaintiff for the defendant at his instance and request. defendant having lost a sum of money above £10, upon a bet at a horse race, requested the plaintiff to pay it for him, The defendant objected that, this money bewhich he did. ing lost at gaming, and recoverable back again by the statute 9 Anne, c. 14, this action would not lie. But the court held that this was not a case within the statute, for there is not the word contract as in the Statute of Usury: Barjeau v. Walmsley (\*). So the court here held this was not a case within the statute 9 Anne, and gave judgment for the plaintiff." That was certainly a very strict construction of the act, but it must be remembered that it is a penal act. case is directly in point, and I can see no reason why we should attempt to overrule it. I think, therefore, that the Registrar's decision is right, and ought to be affirmed.

758] \*James, L.J.: I am of the same opinion. This very point has to my knowledge been decided before by this court, with reference both to bets on horse races and to contracts for the payments of differences on the Stock Exchange, though I cannot undertake to say that this act of 5 & 6

Will. 4 was referred to on those occasions.

Bramwell, L.J.: I am of the same opinion, and I have nothing to add.

Appeal dismissed with costs.

Solicitors for appellant: Pyke & Minchin.

Solicitor for respondent: C. J. Mander, agent for Hunter & Curtis, Leicester.

(1) 2 Wils., 309.

(\*) Str., 1248.

See 21 Eng. Rep., 530 note. The principal case seems to have proceeded upon the theory that the money was not lent to enable the borrower to gamble, for the gambling had been done, and consequently the

money was not loaned to aid him in gaming.

A contract prohibited and void by the laws of the state where it was made will not be enforced in another jurisdiction: Kennedy v. Cochran, 65 Maine, 594; Daniels v. McCabe, 3 Cliff., 114.

An exception to the rule that contracts valid when made are valid everywhere, is that no nation or state is bound to recognize or enforce any contracts which are injurious to its own interests, or the welfare of its own people, or which are in fraud and violation of its own laws: Hill v. Spear, 50 N. H., 253.

Where a contract made in one state is to be performed in another, the parties are chargeable with notice of the laws of that state: DeWitt v. Brisbane, 16 N. Y., 514; Hill v. Spear, 50 N. H., 253; Wilson v. Morgan, 4 Rob., 67; Union, etc., v. Erie, etc., 87 N. J. Law, 23; Hall v. Coetello, 48 N. H., 176.

And if invalid, where to be executed, the courts of that state will not enforce: DeWitt v. Brisbane, 16 N. Y., 508; Union, etc., v. Erie, etc., 37 N. J. Law, 28; Hall v. Costello, 48 N. H., 176.

If a statute forbid the advertising of lotteries, the advertising thereof is illegal, though such lottery be legally authorized by another state: Grover v. Morris, 73 N. Y., 180.

So is a contract to sell tickets in a foreign lottery: Rolfe v. Delmar, 7 Rob., 80.

A mere sale in the ordinary course of business in one state or country, made with knowledge that the vendee intended to use the property to violate some positive law of another state or country, can be the foundation of an action in the state or country whose law was intended to be violated: Shortwell v. Hughes, 1 Curtis (U.S.), 244; Hill v. Spear, 50 N. H., 258; Hull v. Ruggles, 56 N. Y., 428-9; 3 Southern Law Rev., 493.

Iowa: In this state the mere sale of liquors in another state to be sold here seems to be illegal, if made with intent to enable the buyer to violate the law of the state: Second, etc., v.

Curren, 36 Iowa, 555.

Massachusetts: But see, in this state, Dixie v. Abbott, 7 Cush., 610; Hubbell v. Flint, 18 Gray, 277; Poultney v. Mackey, 18 Gray, 280; Suit v. Woodhull, 118 Mass., 391.

Though the mere fact that plaintiff knew at time of the sale that defendant was a grocer and liquor dealer in this commonwealth, does not necessarily prove knowledge on the part of plaintiff that defendant intended to sell the liquors again illegally: Frank v. O'Neill, 125 Mass., 473.

See, also, Rice v. Enwright, 119 Mass., 187.

Michigan: Monaghan v. Reed, 40 Mich., 665; Webber v. Donnelly, 83 Mich., 469.

Mississippi: Walker v. Jeffries, 45 Miss., 160.

New Hampshire: Butler v. Northumberland, 50 N. H., 83; Hill v. Spear, 50 N. H., 253.

See Corning v. Abbott, 54 N. H., 469.
New York: Tracy v. Talmadge, 14
N. Y., 162; Hull v. Ruggles, 56 N. Y.,
428-9; Kreiss v. Seligman, 8 Barb., 489, 5 How. Pr., 425.

Rhode Island: Schlessinger v. Stratton, 9 R. I., 578.

Tennessee: Henderson v. McCoy, 2 Lea, 133; Swift v. Adkins, Id., 137. Texas: McKinney v. Andrews, 41 Tex., 363.

United States, Circuit and Distriot: Green v. Collins, 8 Cliff., 494.
Vermont: Tuttle v. Holland, 48 Verm., 542.

Though if the seller do any act whatever to aid the purchaser in such violation, or to further him in doing so, he cannot recover: 3 Southern Law Rev., 493; Hill v. Spear, 50 N. H., 253; Hull v. Ruggles, 56 N. Y., 428-9. Canada, Upper: Mullen v. Kerr, 6 U. C. K. B. (O.S.), 171.

New Hampshire: Skiff v. Johnson, 57 N. H., 475.

New York: Hull v. Ruggles, 56 N. Y., 428-9; Kreiss v. Seligman, 8 Barb., 439, 5 How. Pr., 425; Turck v. Richmond, 13 Barb., 533; Smith v.

Joyce, 12 Barb., 21.
Tennessee: Swift v. Adkins, 2 Lea, 137; Henderson v. McCoy, 2 Lea.

United States, Circuit and District: Green v. Collins, 3 Cliff., 494.

In Hull v. Ruggles (56 N. Y., 428-9), the court, speaking of Tracy v. Talmadge (14 N. Y., 169), said: "That case does hold that mere knowledge by the vendor, that the purchaser intends to make an unlawful use of the property, is not a defence to an action for its price. That is perhaps all that was necessary to decide in that case for the determination of the questions there involved.

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"But it is also said there, that if the vendor, with knowledge of the intent of the purchaser, do any thing beyond making the sale to aid or further the unlawful design, he cannot recover for the property. And in the opinion given, there are cited the not unfamiliar English cases in which it is held that if the goods be bought with a purpose of smuggling them into England, though the vendor have knowledge of the purpose, he may recover the price of the goods if he do nothing to aid in carrying out the design (Holman v. Johnson, Cowp., 341); but if he has so packed the goods as to facilitate the smuggling, he is regarded as particeps criminis, and cannot recover. Biggs v. Lawrence, 3 Term R., 454; Clugas v. Penaluna, 4 id., 466; Waymell v. Reed, 5 id., 599.

"The acts of the plaintiff bring him within the principle established by those authorities. We know of no authority in this state which is in conflict

with that principle."

When liquors are sold subject to approval of the buyer on arrival at his place of business, it is a sale in the state of his residence, and governed by the laws thereof: Rindskopf v. De

Ruyter, 39 Mich., 1. See Kling v. Fries, 88 Mich., 275; Roethkee v. Philip, etc., Id., 340; Web-

ber v. Donnelly, Id., 469.

To make a contract unlawful, as being against public policy or law, it must be manifestly and directly so, and it is not enough that the contract is connected with some violation of the law, however remotely or indirectly: Bier v. Dozier, 24 Gratt. (Va.), 1.

An action can be sustained in our courts on a contract made in Cuba, although not stamped as required by the laws of Cuba: Skinner v. Tinker, 34

Barb., 233.

A contract which contravenes the provisions or policy of a public law is void, but a transaction to be void in law as a contract must first have life as a completed treaty between the parties: Cannon v. Cannon, 26 N. J. Eq.,

No court will lend its aid to a man who founds his action upon an illegal contract: Harris v. Brisbane, 16 N. Y.,

The courts will not proceed to judgment on a contract contra bonos mores.

If the objection be not made by the party charged, it is the duty of the court to make it on its own behalf.

Courts owe it to public justice and to their own integrity to refuse to become parties to contracts essentially violating morality or public policy, by enter-taining actions upon them. It is judicial duty always to turn a suitor upon such a contract out of court, whenever and however the character of the contract is made to appear: Wight v. Rindskopf, 43 Wisc., 348.

The objection may often sound very ill in the mouth of a defendant, but it is not for his sake the objection is allowed; it is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties. That principle of public policy is, that no court will lend its aid to a party who grounds his action upon an immoral or upon an illegal act: Mitchell v. Smith. 1 Binn., 118; Siedenhender v. Charles' Admrs., 4 S. & R., 159.

The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation: Coppell v. Hall, 7

Wall., 558; Holt v. Green, 73 Penn. St., 201, 13 Am. R., 739.
See, also, Rose v. Truax, 21 Barb., 861; Tyler v. Yates, 3 id., 228; Leavitt v. Palmer, 3 N. Y., 19; Talmadge v. Pell, 7 id., 828.

Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case: Coppell v. Hall, 7

Wall., 558.

When the illegality of the contract appears from plaintiff's case, defendant may take advantage thereof, though he have not pleaded or shown such illegality: Lafarge v. Herter, 9 N. Y., 248-4, 11 Barb., 159.

If the plaintiff asks the enforcement of an illegal contract which appears in his declaration, it is the duty of the court to repel him, upon grounds of public policy. The rule is different where the illegality of the contract is declared by the defendant: Cate v. Blair, 6 Coldw. (Tenn.), 639.

No recovery can be had for value parted with on an illegal contract: Peck v. Burr, 10 N. Y., 294; Westfall

v. Jones, 23 Barb., 9.

Property acquired on an illegal con-

sideration (i.e., illicit intercourse), cannot be recovered by volunteers under one party to the illegality from the other party; the position of the pos-sessor, as between them, being best: Murdock v. Ahern, 4 Victorian L. R. (Eq.), 244.
The distinction between contracts to

do acts which are mala prohibita and such as are mala in se is now quite repudiated: 2 Chitty on Cont. (11th Am. ed.), 974; White v. Bass, 3 Cush., 449 -450; 1 Story on Cont. (5th ed.), §§

612-615.

The test of illegality is, does the plaintiff require any aid from the illegal transaction in order to establish his claim? Simpson v. Bloss, 7 Taunt., 246; Story on Agency, § 348 note.

The test is whether the contract on which the claim is founded can or cannot be wholly disconnected from the illegal transaction, or whether it was in furtherance thereof: 1 Story on

Contract, 5th ed., § 762.

The distinction between the cases in which a recovery can be had, and the cases in which a recovery cannot be had, of money connected with illegal transactions, which seems now best supported, is this: that, whenever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, then he is not entitled to recover any advances made by him, connected with that contract. But, when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, and the title of the party to recover is not dependent upon that contract, but his case may be proved without reference to it, then he is entitled to recover: Story Agency, § 348, note near close: King v. Wynants, 71 N. C., 472.

If the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be a new contract, it is equally tainted by it: Toler v. Armstrong, 4 Wash. C. C. R., 299; affirmed 11 Wheat., 258.

Mr. Bishop (Bish. on Cont., § 458) lays down the rule thus:

Any act which is forbidden either by the common or the statutory law, whether it is malum in se or merely

malum prohibitum, indictable or only subject to a penalty or forfeiture, or however otherwise prohibited by a statute or the common law, cannot be the foundation of a valid contract; nor can any thing auxiliary to, or promotive of such act.

In Stackpole v. Earle (2 Wilson, 133), the plaintiff alleged that defend-ant being surveyor of the baggage of the port of London, and anxious to dispose of his place, agreed with plaintiff that if he "would use his endeavors to procure, and would procure, a proper person to purchase said place of defendant, he would pay plaintiff £2 for every 2100 that such person should give for the purchase of said place." The dec-laration then alleged that plaintiff used his endeavors to find, and did find, de-fendant a purchaser for the place, who paid him £1,200 therefor, and demanded judgment for £24.

The case shows that, upon debating this case at the bar, it was urged by the counsel for the plaintiff that he was neither a buyer or seller of the place or office, and that what he had done was at the defendant's request, and was neither malum in se nor malum prohibitum, and therefore he ought to be satisfied for his labor and trouble; but the whole court was of the opinion that it was malum prohibitum, and within the statute of 5 and 6 Edw. 6, cap. 16, sec. 2. And though the plaintiff himself was neither buyer or seller, yet this appears to be a promise to pay him money to the intent that a person should have an office belonging to the customs, which is within the very words of the statute; but Mr. Justice Clive said he thought the selling of offices was malum in se at common law, and that if the statute had never been made, he thought the procuring a person to buy the office of the defendant was not a good consideration in law to raise an assumpsit (which was not denied by any of the judges) because it was illegal; as if a gaoler permits a prisoner to go at large upon his promising to satisfy the debt for which he is imprisoned, he escapes by the consent of the gaoler, and does not pay the debt according to his promise, the gaoler brings assumpsit, but shall not recover because the consideration was illegal; for it is a most certain principle that every consideration to ground an assumpsit upon Ex parte Pyke. In re Lister.

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must be lawful: Vide Tompkins and Bennett, 1 Salk., 22; Co. Litt., 234; Sir Arthur Ingram's Case, 16 Viner, 126, pl. 3; Smith v. Coleshill, 1 Ro. Abr., 16; 1 Ro. Rep., 313; Dyer, 18, pl. 13.

pl. 13.

When a contract is illegal under the statute or common law, the illegality will extend to all antecedent contracts made in aid of or to effectuate the illegal purpose: 2 Smith's Lead. Cas. (7th Am. ed.), 283, marg. p. 306; Watson v. Fletcher, 7 Gratt. (Va.), 1.

A contract made to aid in securing an illegal end or object, cannot be enforced by one who entered into it knowing that it was made to aid in bringing about such illegal result: Clancy v. Onondaga, etc., 62 Barb., 395, 407, and cases cited.

When an act is expressly forbidden by law, all contracts growing out of its performance are void: Bell v. Quin, 2 Sandf., 146, 151.

No contract which originates in an act contrary to the true principles of morality can be made the subject of recovery in courts of justice: King v. Wynants, 71 N. C., 469; Blythe v. Levingood, 2 Ired., 20.

No man ought to be heard in a court of justice who seeks to enforce a contract founded in or arising out of moral or political turpitude: Toler v. Armstrong, 4 Wash. Cir. Ct. R., 297, affirmed 11 Wheat., 258, 268.

No right of action can spring out of an illegal contract, whether it be prohibited by positive law, or is opposed to public policy, or contrary to good morals: as where one agreed to use his influence with the department of public docks to enter into a contract with the defendant: Pease v. Walsh, 39 N. Y. Super. Ct. R., 514, 49 How. Pr., 269.

When the contract grows immediately out of and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it; and if the contract be in part only connected with the illegal transaction and grows immediately out of it, though it be in fact a new contract, it is equally tainted by the illegality of the transaction from which it sprung: Gray v. Hook, 4 N. Y., 459; Burton v. Port, etc., 20 Barb., 397.

He cannot recover because he cannot be allowed to prove the illegal contract as the foundation for his right of recovery: Melchoir v. McCarty, 31 Wisc., 254.

In Hull v. Ruggles and others (56 N. Y., 424; 65 Barb., 432) plaintiff sold to defendants a quantity of packages of candies and silverware at their fair value. Defendants intended to sell the packages, some of which should contain tickets entitling the purchaser to a piece of silverware, for more than their value. Plaintiff put the tickets into the packages, but was to have nothing whatever to do with defendants' sales of them. This court held that plaintiff knowing what defendants were to do with the packages and having placed the tickets in some of them, aided in a lottery, and that therefore he could not recover for the candies and silverware.

In an action by an agent against his principal to recover compensation as such agent, in the making of a contract which is illegal and void by statute, and also for money paid on account of the principal, in the execution thereof, the principal may defend against the action, on the ground of the illegality of the contract: Stebbins c. Leowolf, 3 Cush., 137.

If an agent effect an illegal contract he cannot recover from his principal the sum he has paid in effecting it, although he proves an express promise by the principal to pay him: Baylev e. Rawlins, 7 Law Jour., K. B. (1829), 208.

An agent cannot earn commissions by a transaction contrary to good morals or to the precepts or policy of the law: Wharton on Agency, § 334.

Where any part of the consideration of a contract is illegal, that may vitiate the whole contract; but where a part of the consideration of a contract with one party is a contract of the other party which is void or voidable but not illegal, that does not taint the whole consideration or make void what would otherwise be valid: Clements v. Marston, 52 N. H., 31, distinguishing Crawford z. Parsons, 18 N. H., 293.

The defendant having lost large sums of money to the plaintiff in gaming, gave several bills to make up the amount. Being unable to pay them when due, he arranged with the plaintiff that the latter should pay off a legal debt for which the defendant was pressed, and gave the plaintiff in satis-

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faction of his claims bills for an amount less than that of the original bills, one of the later bills being for an amount not greater than that of the legal debt which the plaintiff had paid for him. Held, that the whole was one transaction, for which the consideration was not severable, and that the plaintiff could not recover on the last mentioned bill: Collin v. Stewart, 4 Victorian Law Rep. (Law), 211.

In an action upon a contract for personal services, which is held to be illegal and void, the plaintiff cannot recover under the quantum meruit for such of the services rendered as were lawful in their character, and not against public policy; where there is no distinct evidence of their value, and they are blended and have not been in any way separated or disconnected from the illegal services, and are not, in fact, capable of such severance or disconnection: Brown v. Brown, 84 Barb., 534; Widon v. Webb, 20 Ohio St., 431; Brigham v. Potter, 14 Gray, 522.

The mere knowledge, on the part of the lender of money, of the illegal use that the borrower intends to make of the money, is not enough, of itself, to fix the stain of illegality upon the lender. In order to do this, it must appear that the lender made the loan on his part to furnish the money to enable the borrower to do the illegal act: McGavock v. Puryear, 6 Coldw.

(Tenn.), 34.

If money be lent to aid in the accomplishment of an illegal purpose, such illegality is not purged by the borrower failing to so apply the money: Kingsbury v. Flemming, 66 N. C., 524.

A security taken for a bona fide loan of money is not fraudulent and void, merely because the money was lent to enable the borrower to leave the country in order to escape from his creditors: Hall v. Kissock, 11 U. C. Q. B., 1.

Where possession of goods has been taken under a bill of sale, part of the consideration for which is money advanced for the bona fide purpose of obtaining security for a pre-existing debt, the transaction is not invalid though the creditor be aware, at the time of the advance, that the debtor has committed felony and intends to leave the country, and to apply a portion of the money advanced for that purpose: Bagot v. Arnott, Ir. Rep., 2 C. L., 1, dis-

tinguishing Pearce v. Brooks, L. R., 1 Ex., 213.

A court of equity will not lend its aid to enforce a contract growing immediately out of and connected with an illegal or immoral act. Therefore, where a party purchases land of another at a price greatly less than its value, if not for the purpose of taking advan-tage of the vendor, at least for the purpose of enabling him to go out of the state and avoid a prosecution for felony, a court of equity will not lend its aid to enforce a contract made under such circumstances: Dorson v. Sward, 2 W. Va., 511.

Knowledge on the part of the lender that money was borrowed for an illegal purpose does not affect his right to recover, unless it was his object and purpose that it should be so used: Bond v. Perkins, 4 Heisk. (Tenn.), 364.

In an action based upon a contract of loan of money between plaintiff and defendant, it is not material whether a prior agreement between the plaintiff and a third person, under which the money loaned to the defendant was paid to the plaintiff as part of its consideration, is against public policy or not: Wintermute v. Stinson, 16 Minn.,

Where a promissory note was given by A. as principal and B. as surety, the consideration of which was the being a substitute in the Confederate army, and afterwards the surety, at the request of the principal, paid off the note, and the principal gave his note to the surety for the amount paid: Held, that the last contract was not affected by the illegality of the original note, nor by any knowledge which the surety may have had of that fact: Powell v. Smith, 66 N. C., 401, 5 Am. L. T. Rep., 855; McElroy v. Maclear, 7 Cold. (Tenn.), 140; McGavock v. Puryear, 6 Cold. (Tenn.), 34.

See Kingsbury v. Fleming, 66 N. C.,

If a plaintiff, seeking to recover a claim, can establish it only through the medium of an illegal agreement between himself and the defendant, he must fail; but if the cause of action be unconnected with such illegal agreement, and founded upon a distinct and collateral consideration, a recovery may be had.

A. the assignee of a lottery granted

by the state of Rhode Island, and the proprietor of all the tickets in such lottery not sold at the time of drawing, intrusted C., residing in Hartford, in this state, who then was, and for a long time had been, the agent of A., for the sale of tickets in such lottery, with a large number of tickets to sell or return, which were held by C., as the agent of A., at the time of the drawing of the lottery. One of the tickets so held by C. drew a prize of \$80,000. By a fraudulent combination with D., C. obtained information of that fact in advance of the mail, and in his return of sales to A., included such prize ticket as sold to D. before the drawing.

C. and D. afterwards caused this ticket to be presented to A. for payment of the prize, representing D. as the bona fide owner thereof, and A., being ignorant of the fraud, thereupon paid the prize. On a bill in chancery, brought by A. against C. and D. to recover back the money so paid, it was held that the agency of C. to sell terminated with the drawing of the lottery, and he thereupon became a mere depositary; that the fraudulent combination between C. and D., and the consequent injury to A., were entirely independent of any act in which A. had participated prohibited by the laws of this state, and consequently that A. was not precluded from a recovery on the ground of his being in pari delicto: Phalen v. Clark, 19 Conn., 420.

Where one party to an illegal and void parol contract performs on his part, and then takes from the other a covenant to perform on his part, the covenant is void.

And the covenant is void although it has a new and legal consideration, provided it is also founded upon the original illegal contract.

A seal does not protect an illegal contract nor prevent inquiry into the legality of the consideration.

Every new agreement entered into, for the purpose of carrying into effect any of the unexecuted provisions of a previous illegal contract, is void: Gray v. Hook, 4 N. Y., 449, reversing 6 Barb., 398; Leavitt v. Palmer, 3 N. Y., 19; Niver v. Best, 10 Barb., 369; Seneca, etc., v. Lamb, 26 Barb., 595.

Where parties knowingly advance means to aid another to compromise a felony, and are present and assist in the negotiation, the mortgage taken by them for such consideration is void. Fellows  $\sigma$ . Hyring, 23 How. Pr., 230.

Fellows v. Hyring, 23 How. Pr., 230.

Money lent for the purpose of gaming, or of playing at an illegal game, cannot be recovered back: 21 Eng. R., 532 note; 1 Story on Cont. (5th ed.), \$ 762; McKinnell v. Robinson, 8 M. & W., 434; White v. Buss, 3 Cush., 448; Sampson v. Whitney, 27 La. Ann., 294; Morgan v. Groff, 5 Den., 364, 4 Barb., 524; Swift v. Adkins, 2 Lea (Tenn.), 137; Mordecai v. Dawkins, 9 Richardson (S.C.), 262; Ruckman v. Bryan, 3 Den., 340; Alfriend v. Hugbes, 4 Bush (Ky.), 40.

So one who signs a note to secure money bet on election: Harley v. Stapleton, 24 Mo., 244.

See Craige v. Missouri, 4 Peters, 410; Kingsbury v. Fleming, 66 N. C., 524; Bailey v. Omahoney, 33 N. Y. Superior Ct. R., 239; Bailey v. Duffy, 14 Penn. St. R., 18; 7 Alb. L. J., 310; Leavitt v. Blatchford, 5 Barb., 9, 3 N. Y., 19; Nellis v. Clark, 4 Hill, 480-1; 20 Wend., 24; Walker v. Jeffries, 45

Miss., 160.

Where one gave money to another to bet on election, but he did not do so, held the depositary could recover back the money: Morgan v. Groff, 4 Barb., 524; Merritt v. Millard, 5 Bosw., 645, 10 Bosw., 810, 3 Abb. Ct. App. Dec., 291; Fogarty v. Jordan, 2 Rob., 319, 324; Murray v. Vanderbilt, 39 Barb., 141; Pointer v. Smith, 7 Heisk., 187; Brooks v. Martin, 2 Wall., 70; Wilson v. Owen, 30 Mich., 474.

Where an illegal contract has been fully executed, and money paid thereunder remains in the hands of a mere depositary who holds the money for the use of one of the parties to the contract, an action brought to recover the money so held will be sustained.

A third person who receives money from one party to be paid to another, which payment could not have been enforced between the two parties on account of the illegality of the transaction between them, cannot interpose such illegality as a defence to an action brought against him to enforce payment.

payment.
Where, however, the recovery of the money requires the enforcement by the court of any of the unexecuted provisions of the illegal contract, no action can be maintained; Woodworth v. Ben-

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nett, 43 N. Y., 273; Niver v. Best, 10 Barb., 369; Pepper v. Haight, 20 Barb., 429; Oneida, etc., v. Ontario, etc., 21 N. Y., 490.

If the note sued on exhibits on its face an illegal contract and had been executed in consideration for a pre-existing note, the plaintiff cannot recover the amount of the first note and inter-The court should have est thereon. dismissed the suit brought upon the note: Cate v. Blair, 6 Coldw. (Tenn.), 639.

A contract supported by a promise to do two things, one of which is legal and the other illegal, may be enforced as to that which is legal, unless the two are so bound together and mingled that they cannot be separated, in which case the whole promise will be treated as void: Casady v. Woodbury County, 13 Iowa, 113.

A note given during the late war for money borrowed expressly for the purpose of paying taxes to a county in one of the rebellious states was not founded upon an illegal consideration, and the lender may recover upon it: Williams

v. Munroe, 67 N. C., 133.

Where a county contracted a debt during the late war for the purpose of equipping soldiers for the Confederate service, and afterwards borrowed money to pay that debt; held that a recovery can be had on a bond given for such money, on the ground that the illegality is too remote: Poindexter v. Davis, 67 N. C., 112.

A party claiming title to personalty through an illegal transaction cannot resist an action by one whose title is

bare possession only.

A. was the owner of a ticket in a lottery, which he passed over to B. The evidence was conflicting as to whether the transaction was a gift of the ticket and of whatever it might draw, or whether it was handed to B. to obtain what it might draw, as agent for A. The ticket drew a pair of horses, of which B. obtained posses-A. transferred all his right to K., who went to B. and by threats and menaces succeeded in acquiring possession of the horses:

In an action of replevin by B. against K., held that B. could recover: Kistner v. Newhouse, 4 Weekly Notes

(Sup. Ct. Pa.), 452.

Courts of justice will not sit to de-25 ENG. REP.

termine wagers, or to compel parties to pay their bets: Waterman v. Buckland, 1 Mo. App., 45; Ramsey v. Berry, 65 Maine, 570.

Lotteries are, in their nature, prejudicial to the public morals: Stone v. State of Mississippi, 10 Cent. L. J., 449; 1 Ky. L. R., 146, Supreme Court United States, not yet reported in

Chief Justice Waite said (10 Cent. L. J., 450); "That they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt." Again (p. 169): "No legislature can bargain away the public health, or the public morals. The people themselves cannot do it, much less their servants."

In Phalen v. Virginia (8 How. U.S., 168), Judge Grier said : "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."

A sale of lottery tickets being illegal, a lease of premises to be used for the purposes of such sale is void, and the rent reserved therein cannot be recovered: Edelmuth v. McGarren, 4 Daly,

467, 45 How. Pr., 191.

A person who is employed to sell lottery tickets, after having sold a quantity of tickets refused to pay over the money. Held, that as the lottery was illegal, every contract made in furtherance was void, and that no action would lie to recover back the money: Negley v. Devlin, 12 Abb. (N. S.), 210.

So, money advanced to an agent by the managers of a lottery to forward the sale of tickets by him in this state cannot be recovered back: Rolfe v. Delmar, 7 Rob., 80.

If a check be given solely for money lost at "faro," the consideration is illegal, and it is void as between the ori-

ginal parties.

If before trial, notice be given that defendant will require plaintiff to prove the manner in which he received, and the consideration he paid for the Ex part Pyke. In re Lister. C.A.

check, and defendant shows that the check was void as between the original parties, plaintiff must show that he paid value to entitle him to recover: Fuller v. Hutchings, 2 Labatt, (Cal.), 93.

If the parties to an illegal wager deposit money with a stakeholder, and after the wager is decided against one of the parties, he contends that he is the winner, demands the whole of the deposit, and forbids its payment to the other party, but does not demand the return of his half of the deposit, he cannot maintain an action for such half against the other party after the stakeholder has paid the whole deposit to the winner; although the latter received it with knowledge that the plaintig had forbidden its payment to him: Patterson v. Clark, 126 Mass., 531.

A wager on a horse race is illegal and void, and the winner cannot recover from the stakeholder more than his own deposit: McLain & Huffman, 30 Ark., 428.

In trover to recover the value of a mare lost on a wager, on a horse race, it is error in an instruction to make the plaintiff's right to recover depend upon the fact that the animal was taken against the will and protest of the plaintiff. The action lies, although the plaintiff may have voluntarily given possession: Richardson v. Kelly, 85 llls., 491.

A. and C. made a bet on the presidential election, and deposited the stakes with W. Afterwards becoming dissatisfied with the stakeholder, they demanded their money, and received W.'s note for the amount with two indorsers. A. had the note discounted at the bank, and while it was in bank, assigned it to plaintiff. The note went to protest. In an action by plaintiff against W. and his indorsers, the jury found that the plaintiff was not a bona fide holder for value, and without notice: Held, that plaintiff could not recover. Held, further, that the note was tainted with illegality in its origin, and could, therefore, be good only in the hands of a purchaser for value in good faith, and without notice: Atwood v. Weeden, 12 R. I., 293.

No right of action accrues against a bailee or stakeholder before demand, and a refusal to deliver the deposit unless there has been a wrongful conversion or some loss by gross negli-

gence on his part; but after demand, the depositor may recover his money: Morgan v. Beaument, 121 Mass., 7; McLain v. Huffman, 30 Ark., 428; Gilman v. Woodcock, 69 Maine, 118; Pettillen v. Hipple, 90 Ills., 420; Atwood v. Weeden, 12 R. I., 293.

A lease of premises for a bowling alley is illegal: Updike v. Campbell, 4 E. D. Smith, 570.

In DeGroot v. Vanduzer (20 Wend., 390, reversing 17 Wend., 170), the court of errors held that a broker who undertook to "aid" in violation of a law, could not recover.

One cannot recover for building a nine-pin alley, if illegal: Spingraw v. McElwain, 6 Ohio, 44.

Contra: Michael v. Bacon, 49 Mo.,

474; Bishop v. Henry, 34 Tex., 245.
A plaintiff cannot recover for his personal services, portions of which were rendered in an employment of selling liquors unlawfully, the contract of service being an entirety, but he is not to be prevented from recovering for his services contracted to be rendered in a lawful employment, merely because during the term of his employ-ment he occasionally assisted his em-ployer in such unlawful business gratuitously, not expecting or seeking any compensation therefor: Goodwin t. Clark, 65 Maine, 280.

The plaintiff, a counsellor at law, instigated the defendant with others to engage in a riot, and promised to defend them if they were prosecuted. The defendant was prosecuted, and employed the plaintiff to defend him; the plaintiff afterwards sued him for his services and disbursements in defending him. Held, that he could not recover. If there had been nothing unlawful in the acts of the defendant, yet the plaintiff could not recover, as his services were rendered upon consideration of the performance of those acts, and in fulfilment of his promise to render them if the acts were performed.

But, aside from this view, the unlawfulness of the acts which the plaintiff procured the defendant to perform vitiated the whole contract between the parties, and on grounds of public policy the plaintiff ought not to be allowed to recover: Treat v. Jones, 28 Conn., 334; Arrington v. Sneed, 18 Tex., 135.

During the late rebellion B. engaged

in illicit trade with the enemy, was detected by A., and to prevent his exposure to the authorities he paid A. \$1,000: Held, B. could not recover it back: Arter v. Byington, 44 Ills., 468.

The law will not aid either party to enforce an agreement entered into for the purpose of advancing the selling price of stock by means of fictitious dealings, designed to produce a false impression on the minds of observers concerning their real value, and in that way to induce them to invest their money in such stocks. Such an agreement is void and against public policy: Livermore v. Bushnell, 5 Hun, 285.

An action is not maintainable to recover the rent of lodgings knowingly let for the purposes of prostitution: 2 Chitty on Cont. (11th Am. ed.), 980.

Nor for a coach hired to a prostitute to be used to attract men: Pearce v. Brooks, L. R., 1 Exch., 212.

So for board and lodging of a prostitute: Meckbee v. Griffith, 2 Cranch. C. C. R., 836.

But see 4 Am. Law Times Rep., 107; 10 Amer. Law Reg. (N.S.), 564 note; Mahood v. Tealza, 26 La. Ann., 108.

Marriage brokerage contracts, to pay one a sum of money on condition that he will bring about a particular marriage, are contrary to public policy, illegal and void, though the marriage contract when entered into would be legal: Addison on Cont. (6th Eng. ed.),

735; Crawford v. Russell, 62 Barb., 92.

If in defence against an action to recover money paid to the defendant's use, at his request, he proves that a ceremony of marriage had been performed between him and the plaintiff, and they were living together as hus-band and wife when she made the payment, she is not estopped from proving that she had a previous husband living at the time of such ceremony; and if it appears that the defendant knew, at the time of the payment, that his marriage with her was invalid, she may recover, although she knew it also:

Robins v. Potter, 98 Mass., 532.

An agreement to procure witnesses to testify to a certain state of facts is immoral, and against public policy: Patterson v. Donner, 48 Cal., 869.

A note given to a bank in consideration of assurances on the part of its officers that they would sign a petition to the judge for clemency towards a relative of the makers who is under arrest for robbing the bank, or that they would be more likely to do so, or that in any manner they would exercise, or be more likely to exercise, influence with the court to secure a lighter sentence, is based upon a consideration opposed to public policy, and is consequently void; and this, upon the ground of the tendency of such an understanding to encourage deception of the judge, and to mislead him in the facts upon which his judicial action should be based: Bucle v. First Nat. Bank of Paw Paw, 27 Mich., 294.

Putting the title to one's lands in the name of another, with the avowed purpose of escaping liability to be drafted under the late enlistment act of Congress, was not in contravention of either the policy or provisions of that act, no property qualification having been thereby required to make one liable to be drafted; hence that act, of itself, does not deprive such grantor of the right to compel a reconveyance of the property to him: Cannon v. Can-non, 26 N. J. Eq., 316.

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## [8 Chancery Division, 758.]

FRY, J., May 11, 1877. C.A., Feb. 26; March 1; May 23, 1878.

## Homer v. Homer.

## [1875 H. 248.]

Will—Construction—Misdescription—Words "at or within"—Devise of all Testator's Lands "situate at or within D."—Contiguous Land not within D.—Devise of all Testator's Lands "situate at G., in the Occupation of S."—Land at G. in the Occupation of J.—Falsa Demonstratio—Argument ab inconvenienti—Suit before Jadicature Act—Construction of Legal Devises—Order to proceed under new Practice.

A testator devised all his lands "situated at or within D., in the occupation of J." The testator was seised of two farms, both in the occupation of J. The greater part of each of the farms was within the parish of D., but three closes of one and one close of the other were respectively situate in an adjoining parish. In each case the portion which was not in the parish of D. immediately adjoined the remainder of the farm, and was only separated from it by the parish boundary, which was, in the one case, a high road, and in the other, a fence. In the latter case the parish church of D. was only a few yards distant from the fence:

Held, reversing the decision of Fry, J., that the devise comprised the four closes

adjoining the parish of D.

The testator also devised all his land "situate at G., in the occupation of S.":

Held (affirming the decision of Fry, J.), that this devise did not include land situate at G., but in the occupation of J.

ate at G., but in the occupation of J.

759] \*Observations on the use of the argument ab inconvenienti in the con-

struction of wills.

A suit having been instituted just before the Judicature Act came into operation, to ascertain the construction of legal devises, an order was made at the trial that the cause should proceed under the new practice.

RICHARD HOMER, by his will, dated the 11th of June, 1847, devised his freehold estate called Bromley Hall, and his other freehold estate late Peskalls, in the parish of Kingswinford, and also all his copyhold hereditaments situate at Sedgley, and also all his manor of Dormstone, and all his messuages, tenements, lands, and hereditaments, situate at or within Dormstone aforesaid, and at Stock Green, in the parish of Fladbury, and then in the several occupations of Josiah Green and —— Summers and John Ganderton, and also his estate called the High Barns, and also all his estate in the parish of Kingsnorton, unto and to the use of his only child Charles Kemp Homer and his assigns during his life; and from and after his decease the testator gave and devised all that his said manor of Dormstone, and all his messuages, tenements, and lands situated at or within Dormstone aforesaid, then in the occupation of the said Josiah Green, and all his lands situated at Stock Green aforesaid, then or late in the occupation of —— Summers, to the uses and upon the trusts therein mentioned, under which the plaintiff, Elizabeth Anne Homer, a great-granddaughter of the testator,

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was, at the date of the filing of the bill, entitled as legal tenant in tail in possession. And from and after the decease of his son C. K. Homer the testator devised his estate called High Barns and his copyhold hereditaments at Sedgley respectively to and upon certain other uses and trusts. And from and after the decease of his said son C. K. Homer he gave and devised all that his "messuage, tenement, and estate situate at or within Dormstone aforesaid, with the several lands, hereditaments, and appurtenances thereunto belonging, called the Quarry Farm, then in the occupation of the said John Ganderton," to and upon certain other uses and trusts therein declared. And the testator devised his estate called Bromley Hall, and his estate late Peskalls (subject to the life estate of C. K. Homer), and all other his freehold estates in the parish of Kingswinford not thereinbefore devised, and all his hereditaments situate in the parish of Dudley, and all his \*undivided one-third part of and [760] in certain other specified estates in the parish of Kingswinford, and his leasehold messuage called Pedmore Hall, and all other the real estates whatsoever and wheresoever, and also all other the leasehold estates whatsoever and wheresoever of or to which he should be seised or possessed or entitled at the time of his decease not thereinbefore otherwise disposed of, to trustees, upon trust for sale and investment of the proceeds upon certain trusts in the will declared.

The testator died on the 11th of June, 1847.

The testator at the time of his decease was possessed of the manor of Dormstone, in the county of Worcester, and also of three freehold farms situate wholly or in part within the limits of the parish of Dormstone, viz., (a) a farm called the Bag End Farm, in the occupation of Josiah Green. farm consisted of a farm house and sixteen closes of land. The farm house and fifteen of the closes were within the parish of Dormstone, and the other close was situate in the adjoining parish of Inkberrow, but adjacent to one of the fifteen closes, and separated from it by a hedge only. (b) A farm called the Manor Farm, also in the occupation of Josiah This farm consisted of a farm house and eleven closes of land. The farm house and eight of the closes were within the parish of Dormstone, and the other three closes were situate in the adjoining parish of Kington. The high road leading from Kington towards Stock Green was the boundary line between the two parishes of Dormstone and Kington; and two of the three closes abutted on the high road, and were separated by it from the other portion of the farm, and the third of the three closes was adjacent to the

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other two. (c) A farm called the Quarry Farm in the occupation of John Ganderton. This farm was wholly within the parish of Dormstone and no question as to it arose in this action. The parish and manor of Dormstone were coextensive.

At the time of his decease the testator was also possessed of two closes of land situate at or near Stock Green, in the parish of Fladbury; one of those closes was at the death of the testator in the occupation of ——Summers as tenant thereof, and no question arose in the action in respect of that close; the other was at the death of the testator in the

occupation of Josiah Green.

The Bag End and Manor Farms were adjacent to each 761] other, \*and Dormstone church was only a few yards distant from that portion of the Bag End Farm which was in Inkberrow parish. The parish of Dormstone contained almost 730 acres of land; there were several houses in various parts of it, but there was no village within or on the confines of the parish. Inkberrow church was distant about three miles from the close in that parish, and Kington church was about the same distance from the closes in the parish of Kington. The testator was not at the time of his decease possessed of or entitled to any messuages, tenements, or lands in the parish of Dormstone other than those to which reference has been made.

The bill in this suit was filed on the 27th of October, 1875, against the trustees of the will, for the purpose of obtaining a declaration that under the devise of the testator's lands, "situate at or within Dormstone," were included the three closes situated in Kington parish, and the one close situate in Inkberrow parish, and a declaration that under the devise of all his lands "situate at Stock Green, then or late in the occupation of —— Summers," was included the close of land situate at Stock Green which was in the occupation of Josiah Green.

There was evidence that the separation of the three closes in Kington parish from the Manor Farm, and of the close in Inkberrow parish from the Bag End Farm, would seriously depreciate the value of those farms respectively.

The cause was heard before Mr. Justice Fry on the 11th

of May, 1877.

Cookson, Q.C., and Onslow, for the plaintiff: As this suit was instituted before the Judicature Act came into operation, an objection might be raised as to the jurisdiction of the court on the ground that the devises are of legal estates. But the objection may be removed by the court

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making an order such as was made in Provident Permanent Building Society v. Greenhill ('), that the cause shall proceed under the new practice.

FRY, J.: If the other side do not object, I will make a

similar order for what it is worth.

\*Cookson, Q.C., and Onslow, for the plaintiff: [762 The devise to C. K. Homer for life, and the devise in remainder under which the plaintiff claims, carried the three closes in Kington parish and the one close in Inkber-These closes might properly be spoken of as row parish. "at" Dormstone. The testator uses the words "at or within," and the word "at" must be construed as meaning something contiguous to, though not within, the parish of Dormstone. The reference to the occupation of Josiah Green assists the argument, and shows what the testator's intention was. If he had said in the several occupations of Green, Summers, and Ganderton, there could have been no doubt.

[FRY, J.: Is there anything to show that the name of Dormstone has been extended by popular usage to any-

thing but the manor and parish?

There is no evidence of that. But, unless the word "parish" is added, Dormstone is not a definite description like "London." Richardson's Dictionary defines "at" as meaning "near approach, nearness or proximity, adjunction or conjunction." Dr. Johnson says "At, before a place, notes the nearness of the place; as, a man is at the house before he is in it." And the dictionaries of Latham and Webster give similar definitions. The principles which guide the court in construing gifts like this are shown in Attwater v. Attwater (\*); Doe v. Bower (\*); Pogson v. Shomas (\*); Doe v. Greathed (\*).

It would be very inconvenient that these four closes should be severed from the rest of the two farms, and sold under the trust for sale of the residue. This would be a

very capricious intention to attribute to the testator.

[FRY, J.: In Martineau v. Briggs (\*) the House of Lords laid it down clearly that the argument ab inconvenienti cannot legitimately be resorted to unless there is an ambiguity on the face of the will. What is the ambiguity in the present case which can authorize me to attend to that argument?]

\*The words "at or within Dormstone," if they do [763]

<sup>(1) 1</sup> Ch. D., 624.

<sup>&#</sup>x27;) 18 Beav., 880.

<sup>(3) 8</sup> B. & Ad., 453.

<sup>(4) 6</sup> Bing. N. C., 337. (5) 8 East, 91, 104.

<sup>(6) 23</sup> W. R., 889.

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not bear the construction which we contend for, are at any

rate ambiguous.

[Fry, J.: If you cannot succeed on the construction of the devise of the life estate to C. K. Homer, you cannot succeed on the devise in remainder?]

We admit that.

Karslake, Q.C., and Kenyon Parker, for the defendants,

were not called upon.

FRY, J.: I am of opinion that the plaintiff's construction is not the true one. The point is a very short one, and I do not think it necessary to hear counsel for the defendants upon it. I need not say it is quite possible I may be wrong, but still I have formed an opinion, and I will express it at once. [His Lordship stated the facts relating to the Manor and Bag End Farms.]

There is no doubt a probability that the testator would intend and desire that the whole of these two farms should pass together, and, if I were at liberty to speculate on what his intention was, it is very probable I should be inclined to hold that he would have desired the whole of these proper-

ties to pass together.

[His Lordship then stated the provisions of the will,

adding:]

The will concludes with a residuary gift which, in my opinion, is large enough to carry anything which did not pass by the previous portions of the will. The present question arises under the first of the gifts in remainder on the life estate of C. K. Homer, but it is very properly admitted by Mr. Cookson, that, if the closes in question did not pass by the gift to C. K. Homer for life, they did not pass by the delege in remainder under which the plaintiff Therefore the first question is, did the four closes in question pass by the gift to C. K. Homer for life? The words which are relied upon as carrying them are these: "All my messuages, tenements, lands and hereditaments situate at or within Dormstone aforesaid, in the several occupations of Josiah Green and —— Summers." Now it cannot be doubted that prima facie, in order for the plaintiff to succeed in her contention she must show two things. She must show, in the first place, that \*these parcels of land were situate at or within Dormstone, and, secondly, that they were in the occupation of Josiah Green or —— Sum-We have nothing to do with John Ganderton now, because the property in his occupation went in a different way in remainder. That these parcels were in the occupation of Green, is not in dispute, and therefore that consid-

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eration is satisfied by the circumstances of the case. The question, therefore, turns on whether or not these closes come within the description "situate at or within Dormstone aforesaid."

Now, it has scarcely been contended that the word "at," as applied to a place which may include a farm, does ex vi termini carry anything more than lands within that place, and I think that is the true meaning of "at" when applied to a thing which may include another thing. When you say a man is "at" a gate or "at" a door you do not mean that he is within the gate or door, but when you say he is at a town or at a village you mean that he is within the town or village. According to my notion of the ordinary meaning of the English language, when we speak of a man as being at Oxford or at Gloucester we mean that he is within the ambits of those respective cities. Therefore, if they had stood alone, it would seem to me not to be capable of argument that the words "lands situate at Dormstone" meant anything but lands situate within the parish and manor of Dormstone, or that they could include lands situate near but not within Dormstone.

But, then, Mr. Cookson has used this argument. has said that I am bound to give effect to every word in the will, if effect can be given to it; that to read the word "at" in the way in which I propose to read it is to make it simply equivalent to the word "within," and that, therefore, the expression "at or within" must mean within or without, provided that which is without be near. He says that, "at" being used in conjunction with the word "within," the expression must mean something more than "within." or else it is tautologous. He says, therefore, it must include something without, though he admits that that which is without must be limited by the condition of being near. I should of course give effect to the word "at" as separate from the word "within" if I could, but there is such a thing as tautology, and \*that thing is not unknown [765] in legal dispositions, and even in wills, and there are circumstances under which you are unable to give a separate meaning to two words.

Now can I in this case, without doing violence to the language used by the testator, say that the word "at" means without but near? It is really a question of language. In my opinion I cannot. Willing as I should be to give some larger effect to the word "at" than that which is carried by the word "within," if I could, I think that I cannot, because I think that to do so would be to violate

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the ordinary meaning of language as used by ordinary Englishmen. Therefore I am not able to accede to this in-

genious argument.

Then Mr. Cookson presents a further argument to this He says that, even if it be not clear that "at" means without but near, by reason of the word "within" being coupled with it, it is at least ambiguous, and that to read it in the one way leads to a convenient, rational, and probable construction, while to read it in the other way is so highly inconvenient that I ought not so to read it. I called his attention to the case of Martineau v. Briggs (') as showing to how great an extent the House of Lords has rejected the argument ab inconvenienti in the construction of wills, and, in my opinion, it is an argument which is to be had recourse to with extreme unwillingness on the part of the court. That it is eminently probable that the testator did intend that these properties should all pass together, I concede, but that is not the question. The question is whether he has expressed an intention that they should so go. I am of opinion that there is nothing so ambiguous in the words "at or within" as to justify me in looking at the inconvenience which it is said will follow from allowing these four parcels of land to pass by the residuary gift, and therefore, in my opinion, I cannot give effect to Mr. Cookson's argument.

There is one other observation which I desire to make, and that is this, that the same expression, "at or within Dormstone," occurs in the subsequent devise of the Quarry Farm, which is to take effect after the death of C. K. Homer. Now that farm was in the occupation of John Ganderton, and therefore is included in and described as "at or within Dormstone" in the gift to C. K. Homer \*for life. Now, separating Quarry Farm, as the testator does when he comes to his gifts in remainder, he still describes it as "at or within Dormstone." It is admitted that the whole of that farm is within the parish and manor of Dormstone. and that no part of it is without but near, and therefore I do find with regard to this very place Dormstone the word "at" used by the testator in a sense which is confessedly tautologous, and that strongly confirms me, if confirmation were needed, in thinking that the word "at" is tautologous when used in respect of the same and other farms in the

gift to the tenant for life.

An argument might have been raised that the material part of the description contained in the will is in reference

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to the occupations. That argument, for a reason which is sufficiently obvious, was rejected by Mr. Cookson. He did not suggest that the description of the lands in the several occupations of Josiah Green, ——Summers, and John Ganderton, carried the whole of those lands in whatever parishes they might be. That argument not having been adduced, and, as I think, not being tenable if it had been adduced, I only refer to it to show that my attention has been drawn to it as a point which might have been urged, though, if it had, I do not think it would have been successful.

I think, therefore, that the four closes in question did not pass by the devise to C. K. Homer as tenant for life, and consequently that they do not pass by the gift in remainder to the plaintiff, but that they do pass by the residuary devise.

Cookson, Q.C., and Onslow, for the plaintiff: The devise in remainder of all the testator's lands situated at Stock Green in the occupation of Summers includes the land at Stock Green in the occupation of Josiah Green. The words referring to the occupation of Summers are a falsa demonstratio, and should be rejected: Down v. Down ('); Stanley v. Stanley (').

[FRY, J.: What do you say is the corpus of the descrip-

tion in the present case ?]

"All my lands situate at Stock Green." Hardwick v.

Hardwick (') is in our favor.

[\*Fry, J.: Is there any case in which the doc- [767 trine of falsa demonstratio has been applied where there were only general words of description in the first instance?

\*\*Karlslake\*\* O.C.: Webber v. Stanley\*\*(\*) is a decision the

Karlslake, Q.C.: Webber v. Stanley (\*) is a decision the other way.]

The word "all" is very important.

Karslake, Q.C., and Kenyon Parker, for the defendants,

were not called upon.

FRY, J.: In my opinion the plaintiff's case fails with regard to this point also. [His Lordship stated the facts and the terms of the devise to C. K. Homer, and continued:]

It is clear that, whatever land there was at Stock Green which was in the occupation of Green, Summers, or Ganderton, if Ganderton had had any there it would all have passed by the devise to the tenant for life. About that there can be and has been no controversy. The question arises on the first gift in remainder after the death of the tenant for life. [His Lordship read the words.]

<sup>(1) 7</sup> Taunt., 848. (2) 2 J. & H., 491.

<sup>(\*)</sup> Law Rep., 16 Eq., 168; 6 Eng. R., 695. (4) 16 C. B. (N.S.), 698.

Now the tenancy of Josiah Green was present to the mind

of the testator, because he has referred to him as one of the persons who occupied land at or within Dormstone. contention before me is this, that, notwithstanding that the words limit the gift of land at Stock Green to land in the occupation of Summers, they include the larger parcel of land there in the occupation of Green, and the case is argued on this footing, that there is enough to satisfy me that the testator meant to give all his land at Stock Green, and that therefore the words expressive of occupation are falsa demonstratio which may be neglected and rejected. I am of opinion that that is not the true construction. seems to me that I am bound to give effect to every word contained in the description as a necessary part of the description, and that, so far as the gift of lands at Stock Green is limited by the expression "in the occupation of Summers." I am bound to give effect to that limitation. \*There are two maxims which have been from time to time used, and which express the two views which have The first is, Falsa demonstratio arisen in cases of this sort. non nocet quum de corpore constat; the other is that which has been cited from Lord Bacon's Tracts, Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram; and the question may in substance be stated in this way. Taking the first maxim in the first place, is there any constat of the subject-matter independently of the words which I am asked to reject? If there be, I quite agree that I can reject the words as falsa demonstratio; but if there be not, I cannot reject them. Now, in this case I am of opinion that I cannot find any constat concerning the subject-matter of the gift independently of the words descriptive of the occupation, and I cannot therefore reject those words as falsa demonstratio. To apply the other maxim to this case, the question is whether the words are not words of true limitation, whether they are not verba quæ competunt in limitationem veram. reason to view them otherwise than as such words. testator had been minded to give to the tenant for life all

his lands at Stock Green, and to give to the persons under whom the plaintiff claims so much of his lands at Stock Green as was occupied by Summers, I know not what more proper expression could be used than that which he has used. Such an intention is not insensible, and even if improbable, is not irrational. It is a perfectly rational gift, and one which the testator may well have intended to make. C.A. Homer v. Homer.

That being so, I am not satisfied that there has been any error. I may speculate, I may imagine, I may suppose that there has been an error, but I have nothing from which I can come to the judicial conclusion that there was an error in describing the property as in the occupation of I view these words, therefore, as words to which full effect is to be given; they are applicable and competent as a true limitation of the gift, and I confine the devise, therefore, to so much of the land at Stock Green as was in the occupation of Summers.

The following declarations were made: First, that the devise to C. K. Homer for life did not include the three closes in the parish \*of Kington, or the one close in the [769] parish of Inkberrow. Secondly, that the devise in remainder after the death of C. K. Homer, under which the plaintiff claimed, did not include the three closes in the parish of Kington, nor the close in the parish of Inkberrow, nor the close situate at Stock Green and in the occupation of Josiah Green. The costs of the suit were ordered to be paid out of the residuary real estate.

From this judgment the plaintiff appealed. The appeal came on to be heard on the 26th of February, 1878.

Cookson, Q.C., and Onslow, for the appellant, contended, first, that the closes in Inkberrow and Kington adjoining the parish of Dormstone passed under the devise of lands "at or within" Dormstone; and, secondly, that the close at Stock Green in the occupation of Josiah Green passed under the devise of the testator's lands at Stock Green then in the occupation of Summers; or if not, that it passed under the devise of lands "at or within Dormstone then in the occupation of Josiah Green"; the name of the occupier being sufficient designation of the land. On the first question they referred to Doe v. Greening ('); Doe v. Lyford ('); Doe v. Greathed ('); Stanley v. Stanley ('); Webber v. Stanley (');

Attwater v. Attwater (\*).

Karslake, Q.C., and Kenyon Parker, for the defendants: With respect to the devise of lands "at or within Dormstone," it is to be observed that the testator has in his will carefully distinguished between the two prepositions. When he refers to a parish he says "in" or "within," when to a locality he says "at." He treats Dormstone throughout as

<sup>(</sup>¹) 8 M. & S., 171.

<sup>(\*) 4</sup> M. & S., 550. (\*) 8 East, 91.

<sup>(4) 2</sup> J. & H., 491. (5) 16 C. B. (N.S.), 698. (6) 18 Beav., 330.

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a parish and a manor, not as a locality, and when he says "at" or "within" Dormstone he means within the parish or at the manor, that is, belonging to the manor. "At" means properly nothing more than "within"; and although "at" is sometimes used with more extended signification, the collocation of the words "at or within" shows that the 770] testator \*did not intend the more extensive signification; otherwise he would have said "within or at": Pogson v. Thomas (); Doe v. Bower (); Doe v. Chichester (). Cookson, in reply on this point.

James, L.J.: We do not wish to hear counsel for the respondents on the second question. The point does not seem to us arguable. The testator gives all his lands at Stock Green in the occupation of Summers. There is no other description than as being in the occupation of Summers. On the first question we will consider our judgment.

BAGGALLAY, L.J.: Two questions are involved May 23. in this appeal; the first, whether certain closes of land not within the parish of Dormstone, but adjacent to other lands which are within that parish, passed under a devise contained in the will of Richard Homer of all his messuages, tenements, and lands situate at or within Dormstone; and the second, whether a certain other close passed under a devise contained in the same will of all the testator's lands situate at Stock Green. [His Lordship then stated the facts of the case, and read the portion of the will set forth above, and continued: This suit was commenced on the 27th of October, 1875, and by her bill the plaintiff prayed, amongst other things, a declaration that the aforesaid close of land situate in the parish of Inkberrow, and the aforesaid three closes of land situate in the parish of Kington, were included in the devise of all the testator's messuages, tenements, and lands situated at or within Dormstone aforesaid, and then in the occupation of the said Josiah Green; and a further declaration that she was entitled to the aforesaid close of land at Stock Green, which was in the occupation of the said Josiah Green. The defendants are the present trustees of the testator's will, and as such represent all persons who are interested in disputing the plaintiff's claims.

771] \*Mr. Justice Fry decided against the plaintiff in respect of both claims, and from his decision the present appeal is brought.

As regards the plaintiff's claim to the closes of land in the parishes of Inkberrow and Kington, the first question which

<sup>(1) 6</sup> Bing. N. C., 837.

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arises is as to the sense in which the testator has used the words "at or within Dormstone aforesaid." Did he mean the parish of Dormstone or the manor of Dormstone (to which he had just previously referred), or some other locality not limited to the boundaries of either the parish or the manor, but including a further area immediately adjacent or near to the parish or manor, of which a person might fairly have said in the language of every-day life, "I met so-and-so yesterday at Dormstone," when the actual place of meeting had been in one of the two parishes of Inkberrow or Kington, though at a spot within fifty or a hundred yards of Dormstone church.

Now, upon this point it is perhaps not immaterial to observe that the testator almost pointedly abstains from the use in any part of his will of the expression "parish of Dormstone," though in describing the other properties included in the devise for life to his son he almost invariably mentions the names of the parishes in which they are situate; the properties so included are four in number, and are described in his will as "in the parish of Kingswinford, in the county of Stafford," "at Sedgley, in the said county of Stafford," "in the parishes of Alveley and Emville, in the counties of Stafford and Salop," and "in the parish of Kingsnorton, in the county of Worcester."

Now, having regard to the terms in which the testator has thus referred to the several properties devised by him, I should have been disposed to hold that by the words "Dormstone aforesaid" he did not intend to refer to the parish of Dormstone alone, but to that more extended district within which portions of his farms were situate; and this view is in my opinion confirmed by the considerations

to which I am about to allude.

It has been contended on behalf of the respondents that the prepositions "at," "in," and "within," when used in reference to localities, have the same meaning; that to speak of a house or lands as being at Brighton, is equivalent to speaking of such house or lands as being in Brighton, or within the limits parochial, municipal, or otherwise of Brighton; and that in the case now under \*consideration the [772 prepositions "at" and "within" ought to be treated as equivalents of each other, not only by reason of their general or ordinary meanings, but also by reason of their being combined in the expression "at or within." I am unable to adopt either of these views. I am unable to draw the same inference from the words being combined in the expression "at or within" as has been contended for on behalf

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of the respondents. On the contrary, it appears to me that the form of expression indicates that the prepositions "at" and "within" were not used by the testator as equivalent in meaning, and that he considered and intended that the words messuages and lands at Dormstone might, and if necessary to give effect to his intentions, should, include something which would not come under the description of messuages and lands within Dormstone. That he should so consider and intend could hardly be doubted, if he had transposed the prepositions and had said "within" or "at," and I am unable to apply an interpretation to the words messuages and lands "at or within" Dormstone different from that which I should think it right to apply to the words messuages and lands "within or at" Dormstone. Again, as regards the suggested equivalent meanings of the prepositions "at," "in," and "within," it appears to me that, though each may occasionally, or indeed frequently, be used in a sense and with a meaning equivalent to the sense and meaning with which the others or either of the others might have been used, the word "at" is frequently used in a sense and with a meaning different from what could be attributed to either of the others.

It appears to me that it would be an inaccurate form of expression to speak of houses or lands as being "at" any locality the bounds or limits of which are at the same time expressly or impliedly indicated, though it would, on the other hand, be perfectly correct to use the preposition "at" in reference to localities as to which no such bounds or limits are indicated. A few short illustrations will explain what I desire to convey. I should not speak of my house "at the county of Sussex," or "at the parish of Brighton," I should say my house "in," or possibly, though not very probably, "within the county or parish." Again, I should never speak of my house or lands "at Sussex," because the bounds or limits of the county would be implied, though 773] the expression \*"Sussex" might alone be used, but I might with perfect correctness say, I have taken a house "at Brighton," or I met so and so "at Portsmouth," because in so doing I should only indicate a locality known by a general name, without in any manner intending to introduce any idea of parochial, municipal, manorial, or other boundary. It would perhaps be more correct to say that the introduction of the preposition "at" before the name of a locality indicates, or may indicate, an intention on the part of the person using the expression that a meaning should be attributed to the locality named different from Homer v. Homer.

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that which would be attributed to it if preceded by the preposition "in" or the preposition "within." Again, it is clear from the frame and terms of the testator's will, that in the devise which is now under consideration, and which was to take effect after the decease of the testator's son, the words "at or within Dormstone aforesaid" were repeated from the previous devise in favor of the son. Now in the devise to the son, the Quarry Farm, in the occupation of Ganderton, was included and it comprised a farm house and lands which were within the parish of Dormstone; and when instead of saying "my messuages and lands in the parish of Dormstone," which would have been sufficient to pass all messuages and lands within that parish, if that was all he intended to pass, and would have been in accordance with the language used by him in reference to messuages and lands in other parishes, we find the testator introducing the preposition "at" and omitting any reference to the parish, the inference is almost irresistible that he intended to describe a district more extensive than that which would be defined by the parish boundary:

But the preposition "at" is not unfrequently used in the sense of "near to" or "adjacent to"—as, "my cottage at the cross roads," "my lands at the turnpike gate;" and even if it were necessary to attribute to the word "Dormstone," as used in the devise in question, a meaning limited as regards its area to the parish or the manor, the closes in Inkberrow and Kington parishes would fairly come within the description of being near or adjacent to such parish or manor.

Having regard to all the circumstances to which I have alluded, I am unable to adopt any other construction of the devise now \*under consideration than that it was the [774 testator's intention that the closes in the parishes of Ink-

berrow and Kington should pass under it.

As regards the second question involved in the appeal, we expressed our concurrence in the view taken by the learned judge at the close of the appellant's case, without calling upon the counsel for the respondents. The close of land in question was not in the occupation of Summers, and it consequently could not pass under the devise of all the testator's messuages and lands "at Stock Green in the occupation of Summers," but it was contended on the part of the appellant that it passed under the devise of all the testator's messuages and lands "at or within Dormstone in the occupation of Josiah Green." It is quite true, as has been already stated, that the close was in the occupation of Josiah Green, and to that extent answered the description given 25 Eng. Rep.

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in the devise, but having regard to the circumstance that it was a detached field distant three-quarters of a mile from Dormstone church, and more than half a mile from the nearest point of any of the testator's farms which were sitnate in the parish of Dormstone, and still more to the circumstance that it was situated in a locality which had its own distinctive name of "Stock Green," it appears to me to be impossible to hold that it passed under a devise of the testator's land at Dormstone.

A number of cases have been cited in the course of the appeal, but having regard to that which appears to me to be the real question for consideration, it does not appear to me

that these cases have much bearing upon it.

As regards Doe v. Greening ('), Doe v. Lyford (2), and Doe v. Chichester (3), all that they established is this, that where a testator has devised all his lands at any particular place, extrinsic evidence is not admissible for the purpose of showing that he intended to pass other lands not situated at that particular place, either by reason of such other lands having been enjoyed with the lands at the specified place for a lengthened period of time, or of the testator having dealt with them as one property, or of his having been in the 775] habit of referring to them as forming one \*property under one distinguishing name, but in neither of these cases was any question raised as to the precise meaning of words describing the lands of which the testator was possessed as being at the named locality. And so, again, all that was decided in Doe v. Bower (') was, that a devise of all the testator's messuages at, in, or near a street called Snig Hill, in Sheffield, the testator being possessed of four houses answering this description, would not pass two other houses of which he was possessed, but which were situated in Gibralter Street, distant a quarter of mile from Snig Hill; and all that was decided in Attwater v. Attwater (') was, that a devise of the testator's leasehold property situate at Chilhampton, in the parish of South Newton, would not include other leaseholds in the same parish, but situate at some distance from Chilhampton; and Pogson v. Thomas (\*) is to the same effect. Neither of these cases have any bearing upon the question as to the proper interpretation to be put upon the words "at Dormstone," though all them are, in my opinion, direct authorities for the view which I have expressed upon the second question involved in this appeal.

<sup>(1) 3</sup> M. & S., 171.

<sup>9) 4</sup> M. & S., 550.

<sup>(8) 4</sup> Dow, 65.

<sup>(4) 3</sup> B. & Ad., 453, (5) 18 Beav., 330, (6) 6 Bing. N. C., 338,

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It is unnecessary, in my opinion, to refer more particularly to the other cases cited.

JAMES, L.J.: I so entirely agree with the judgment of the Lord Justice, in which Lord Justice Thesiger also concurs, that it may appear almost superfluous to read the short postscript which I have written.

According to Richardson's Dictionary "at" is used to denote near approach, nearness or proximity, adjunction or conjunction, association or consociation, connection; and that would seem to be its natural or ordinary idiomatic use in the English language. It may sometimes be equivalent to "in" or "within," but not because the word itself includes the idea of "inclusion" within limits, but by reason

that inclusion involves association or consociation.

You say "I met A. at B.'s house," not because the meeting was actually inside the house, but because the idea intended to be conveyed is the consociation of the meeting with that particular \*house, and it would be equally true [776 whether the meeting was inside or outside the hall door. You do not naturally or properly say "at a manor" or "at a parish," but "within" or "in the manor or parish," but you do say "at a village," because a village is not a defined district, and you can only express association or connection with the village for which "at" is the appropriate preposition.

If I say lands "within" or "in the manor of Dale," or "within" or "in the parish of Dale," the expression is clearly one denoting locality within a particular district, and indeed forming part of it; but if I say lands at Dale, I only express lands having such a connection with Dale as to be by such description identified by any one who knows the lands, and who knows Dale, the church, and village or place which has given its name to the manor or parish. Again, the words "at or within" do not naturally mean "at," that is to say, "within," but ordinarily mean "whether at or within," that is to say, they include any lands of which you would predicate that they were "at," or of which you would predicate that they were "within." Having, then, this kind of expression to deal with, I put aside entirely all history of past dealings with the lands, and ask this questions: What would the words mean in the mouth and ear respectively of two ordinary Englishmen knowing the district or place and the property, as for instance, in a grant of the rights of sporting? Surely a right of sporting, in the very words of this will, would extend over the pieces of land the subject of the present suit. If a surveyor were directed to make a map of the lands of the testator "at or within

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Dormstone," he would make a map including the lands in question. The words ought to have the same meaning in the will.

Solicitor for plaintiff: F. F. Smallpeice, agent for Smallpeice & Sons, Guildford.

Solicitor for defendants: Alexander Helmsley, agent for Deakin, Dent & Son, Wolverhampton.

[8 Chancery Division, 777.]

FRY, J., Dec 17, 1877. C.A., May 24, 1878.

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Parties—Breach of Trust—Action by Cestui que Trust against Representatives of one only of several Trustees—Legacy—Presumption of Assent of Executors and Appropriation of Fund—Payment of Interest—Consolidated Orders of Court of Chancery, Order vii. r. 2.

A testator bequeathed the residue of his personal estate to three trustees, R., L., and I. (who were also his executors), upon trust to invest the same, and to pay the income to his widow for her life, and after her death "to lay out and invest or retain invested" £850, and to pay the income of £500, part thereof, to his daughter M. for her life, with remainder to her children, and upon trust to pay the income of the remaining £350 to his daughter B. for her life, with remainder to her children. And, in the event of the death of his daughter M. without issue, her share was to be divided among L., I., and B. The testator died in December, 1854, and his widow died in June, 1856. The daughter M. died in January, 1859, without issue. After the death of the widow, R. began to pay interest to B. on £350, and after the death of M. on £516 13s. 4d. (i.e., on the £350 and one-third of the £500), and continued the payment half-yearly until his death, which took place in September, 1863. Part of the estate of the original testator consisted of a sum of £1,200 lent upon mortgage. Before the death of R. £700, part of this sum, had been paid off by the mortgagor in instalments. For some of these instalments R. alone gave receipts, and he joined in the receipts for others. After R.'s death, J., one of his executors, continued to pay interest to B. on £516 13s. 4d. until June. 1874, when the payment ceased. He made these payments with the knowledge of his co-executors and of the persons beneficially interested in R.'s estate, and the payments were admitted as proper deductions upon a half-yearly settlement of the accounts of the income of R.'s estate made between the executors and the beneficiaries. The £500 remaining due on the mortgage was paid off by instalments after the death of R., the receipts for the instalments being signed by his executor J., as "for the executors" or "for the trustees" of the original testator. J. paid one-third of the £500 to L., and another third to I., and retained the remaining one-third. In 1877 B. commenced an action against the executors of R. alone, claiming to have the sum of £516 13s. 4d. and the arrears of income made good out of the estate of R.:

Held, by Fry, J., that, as R.'s executors could not properly have paid interest to B. after his death, unless the executors of the original testator had assented to the 778] \*legacy and had set apart in the hands of R. a fund to meet it, it must be assumed that such as appropriation had been in feet media.

assumed that such an appropriation had been in fact made:
And, therefore, that B. was entitled to sue the executors of R. alone, without making

the other trustees of the original testator parties.

And the executors of R., admitting assets, were ordered to make good the £516 13s. 4d., with the arrears of income, out of his estate.

On appeal the defendants waived the objection as to want of parties, and the judgment of Fry, J., was affirmed.

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EDWARD LAMBERT, by his will, dated the 14th of February, 1852, appointed Bryan Cowgill, Isaac Rhodes, and his sons James Lambert and Isaac Lambert, trustees and executors thereof, and he bequeathed to them the residue of his personal estate, upon trust to invest the same as therein mentioned, and to pay the income thereof to his wife. Sarah Lambert, for her life, and after her death to lay out and invest or retain invested as therein mentioned the sum of £850, and to pay the income of £500, part thereof, to his daughter Mary Berry during her life, and after her death to stand possessed of the £500 upon trust for the children of Mary Berry as therein mentioned; and upon trust to pay the income of the remaining £350 to his daughter Betty, the wife of Samuel Blamires (one of the plaintiffs), during her life, for her separate use, and after her death to stand possessed of the £350 in trust for her children as therein mentioned; provided, that in case his son James and his daughters Mary and Betty, or either or any of them, should die without leaving lawful issue living at his or her decease, or who should die before attaining twenty-one, then their shares of his estate should go to and be divided between and amongst his other surviving children and their issue in like manner as their original share or shares were directed to be paid and divided. The testator died on the 23d of Decem-His will was proved by Isaac Rhodes, James Lambert, and Isaac Lambert. Bryan Cowgill never proved the will, and he disclaimed the trusts thereof. Sarah Lambert died on the 1st of June, 1856. Mary Berry died on the 28th of January, 1859, without ever having had any issue, and thereupon Betty Blamires became entitled to the income for her life of £166 13s. 4d. (one-third of the £500 bequeathed to Mary Berry) in addition to the income of £350 to which she became entitled for her life on the death of the testator's widow; i.e., to the income of \*£516 13s. 4d. altogether. The plaintiff Joseph Wilson was a mortgagee of the life interest of Betty Blamires. At the time of the death of the testator there was due to him a sum of £1,200, upon a mortgage of some freehold property belonging to one John Hartley. Isaac Rhodes died on the 4th of September, 1863, having by his will appointed his sons John Rhodes, Thomas Rhodes, and James Rhodes executors thereof, and they all proved his will. Isaac Rhodes advanced Betty Blamires £50, part of the £516 13s. 4d., and he paid her interest half-yearly at the rate of 5 per cent. upon £350 after the death of the widow, and upon £466 13s. 4d. after the death of Mary Berry until his own death, and

after his death his executors continued the half-yearly pay-This action was ment to Betty Blamires until June, 1874. commenced on the 17th of February, 1877, by Joseph Wilson and Betty Blamires (suing by a next friend) against the three executors of Isaac Rhodes and the husband of Betty Blamires. The statement of claim alleged that after the death of Edward Lambert his trustees appropriated £850, part of the mortgage debt of £1,200, in satisfaction of the two legacies of £500 and £350 bequeathed by his will; that Isaac Rhodes, from the date of the appropriation, received the interest on the mortgage debt as it accrued due, and the instalments of principal which were from time to time paid off by Hartley; and that Isaac Rhodes assumed to act as, and was in fact, the sole trustee of the appropriated fund, and that his executors, by paying interest to Betty Blamires, had admitted the appropriation. James Lambert died in February, 1877, before the writ was issued. Isaac Lambert was in New Zealand.

The plaintiffs claimed a declaration that the defendants, as the executors of Isaac Rhodes, were liable to make good the sum of £516 13s. 4d. and all arrears of income in respect thereof; and that they might be ordered to admit assets of their testator, or that his estate might be administered by the court.

The defendants John and Thomas Rhodes by their statement of defence denied the alleged appropriation, and submitted that Isaac Lambert and the personal representatives of James Lambert were necessary parties to the action.

The action came on for trial before Mr. Justice Fry on the

17th of December, 1877.

78()] \*James Rhodes did not deliver any statement of de-

fence, but he appeared by counsel at the trial.

It was in evidence that between the time of Edward Lambert's death and the time of the death of Isaac Rhodes £700. part of the £1,200 mortgage debt, was paid off by Hartley. The payment was made in ten instalments. The first was of £30, on the 6th of June, 1856; the second of £20, on the 16th of August, 1856; the third of £10, on the 5th of September, 1856; the fourth of £12, on the 15th of November, 1856; the fifth of £50, on the 9th of January, 1857; the sixth of £178, on the 8th of April, 1857; the seventh of £100, on the 6th of May, 1857; the eighth of £200, on the 12th of June, 1860; the ninth of £50, on the 30th of November, 1860; the tenth of £50, on the 29th of November, 1861. The receipts for of £50, on the 29th of November, 1861. the first, second, fifth, and sixth instalments were signed by James Lambert and Isaac Lambert. The receipts for the Wilson v. Rhodes.

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third and fourth instalments were signed by Isaac Lambert The receipt for the seventh instalment was signed by Isaac Lambert, Isaac Rhodes, and James Lambert; the receipt for the eighth instalment was signed by Isaac Rhodes and James Lambert. The receipts for the ninth and tenth instalments were signed by Isaac Rhodes alone. two receipts included also respectively two sums of £15 and £13 15s. for interest. The balance of £500 was paid off after the death of Isaac Rhodes in eight instalments. of £50, on the 14th of October, 1863; the second of £30, on the 9th of January, 1864; the third of £20, on the 2d of May, 1864; the fourth of £187, on the 18th of August, 1865; the fifth of £13, on the 30th of August, 1865; the sixth of £55, on the 11th of December, 1865; the seventh of £30, on the 5th of November, 1866; and the eighth of £115, on the 21st of February, 1867. The receipts for the first four instalments were signed by James Rhodes, "for the executors," or "for the trustees of the late Edward Lambert;" the receipt for the fifth instalment was signed "John Rhodes for James Rhodes;" the receipt for the sixth instalment was signed "for the executors, James Rhodes;" the receipt for the seventh instalment was signed "James Rhodes;" and the receipt for the last instalment was signed "James Rhodes. mortgagee's solicitor; James Lambert." After the mortgage debt had been paid off a release of the land from the debt was \*prepared. It bore date the 1st of August, 1870, and was made between James Lambert and Isaac Lambert of the one part, and Hartley of the other part. It contained a recital that Hartley had paid off the principal with interest to James Lambert and Isaac Lambert, and, in consideration of his having done so, it was witnessed that they released the land from the debt. This deed was executed by James Lambert only.

By the evidence of Betty Blamires, it appeared that Isaac Rhodes advanced her £50 on account of the £516 13s. 4d., and that after this he paid her half-yearly £11 13s. 4d. for interest on £466 13s. 4d., and that this payment was continued after his death by James Rhodes, to whom she applied

for the payment, up to July, 1874, when it ceased.

By the evidence of James Rhodes, it appeared that he was aware of the claim of Betty Blamires soon after his father's death. He paid her £11 13s. 4d. (a half-year's interest at 5 per cent. on £466 13s. 4d.), in December, 1863, and he continued to pay her the same sum half-yearly in June and December down to June, 1874. The payments were made out of half yearly rents belonging to his father's estate. These

rents were received by him for some years, and afterwards by his brother John. When he received the rents he made the payments to Mrs. Blamires out of them; when his brother John received them he got the money to pay her from him. His father left seven children, who were equally interested in the rents. They all met together every half year to settle accounts, and the payment to Mrs. Blamires was always allowed at these half-yearly settlements as a deduction from the gross rents. He admitted that he had received £500 after his father's death from Hartley in instalments, and said that he had divided the £500 into thirds, paying one third to James Lambert for himself, and another third to James Lambert for his brother Isaac Lambert. of the other one-third he said that he had paid £50 to his brother John and £50 to his brother Thomas, and that the remainder of it went against the payments of interest which he had made to Mrs. Blamires. John Rhodes and Thomas Rhodes were examined, and they admitted that James Rhodes told them that their father owed some money to Mrs. Blamires, though he did not explain on what account, and \*that they knew of the payments made to her by James Rhodes. They denied that he had paid them the sums of £50 each.

The defendants at the bar admitted assets of Isaac Rhodes

to answer the plaintiff's claim.

North, Q.C., and W. Barber, for the plaintiffs: The facts in evidence, and especially the payment of interest to the plaintiff down to July, 1874, necessarily lead to the inference that a fund was appropriated to answer the legacy to Mrs. Blamires, and that it was held by Isaac Rhodes for the purpose of paying her and the other persons interested in it. We are right, therefore, in suing his executors alone.

Cookson, Q.C., and Bardswell, for John Rhodes and Thomas Rhodes: Isaac Lambert and the executors of James Lambert ought to be made parties. Order VII, rule 2, of the Consolidated Orders of the Court of Chancery is still in force, and it does not authorize the plaintiffs to proceed against the executors of Isaac Rhodes alone: Shipton

v. Rawlins('); Morgan's Chancery Acts (').
[FRY, J., referred to Perry v. Knott (').]

It is clear that Isaac Rhodes received the mortgage money jointly with his co-trustees, and the receipts given after his death were given on behalf of the trustees of Edward Lambert, or as solicitor for the mortgagees. No appropriation of the mortgage money is proved as against Isaac Rhodes; what may have been done after his death cannot affect his

(1) 4 Hare, 619.

(\*) 5th ed., p. 474.

(\*) 5 Beav., 293.

estate. Even if from the payment of interest to Mrs. Blamires it must be assumed that the executors of Edward Lambert had assented to the legacy, it does not follow that any particular fund was appropriated to meet it. Appropriation is a distinct step from assent. The plaintiffs' case must rest upon an appropriation of a fund, and that is not proved by the evidence. We are not estopped by any act of our co-executor James Rhodes. If a breach of trust was committed after the death of Isaac Rhodes, his surviving cotrustees, James Lambert and Isaac Lambert, are the persons liable for it. The release \*of the 1st of August, 1870, [783 rebuts any presumption that Isaac Lambert had constituted himself the sole trustee of the fund which may arise from what was done by his executors after his death.

Kekewich, Q.C., for James Rhodes:

[FRY, J.: My difficulty is that I find payments made by the executors of Isaac Rhodes immediately after his death, which they had no right to make if he had been simply one of the trustees of Edward Lambert's will, but which they would have been right in making if a fund to meet this legacy had been appropriated and was in his hands.]

It ought not to be presumed that the fund was left in the hands of Isaac Rhodes alone by his co-trustees, as that would be an assumption that they were parties to a breach

of trust.

North, in reply.

FRY, J., after stating the provisions of the testator's will, and the dates of his death and the death of his widow, continued:

Upon her death in 1856 there being, as it appears, assets of the testator, it was the duty of the three trustees to invest or retain invested a sum to meet the legacy of £850. I find that they did make payments of the interest on £350 to Mrs. Blamires shortly after the death of her mother, from which I infer that there were sufficient assets to pay the debts of the testator, and that the executors assented to the legacy, and I must further hold that they must be then presumed or inferred to have invested or retained invested that sum of £850 upon the securities which are mentioned in the will. I infer that all those things were done, because, in my judgment, the payment of interest to Mrs. Blamires could not rightly be made until the legacy was assented to, and the investment or appropriation had been made.

In January, 1859, Mary Berry died, and thereupon the £500 which had been bequeathed to her for life went over in thirds to Mrs. Blamires and her two brothers. After that

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event the sum paid to her represented the interest on £350 and £166 13s. 4d. (which was one-third of the £500), less the 784] interest on the sum of \*£50, which she owed to her father's estate. Therefore the interest paid to her after the death of Mrs. Berry was on £466 13s. 4d.

It appears that at the time of the death of Mrs. Sarah Lambert, the tenant for life, the entire amount of £1,200 remained due upon Hartley's mortgage, but that before the death of Isaac Rhodes, in 1863, no less than £700 had been paid off, leaving only £500 due. For that £700 receipts had been given, in two of which, for sums amounting in the aggregate to £300, Isaac Rhodes had joined, and he alone

signed two other receipts for £50 each.

Now, on the death of Isaac Rhodes, supposing that the £350 had been properly dealt with, it would have been in the hands of James Lambert and Isaac Lambert, as the surviving trustees, and the estate of Isaac Rhodes would have had nothing to do with the payment of the £350 or of interest upon it. Furthermore, supposing matters had taken their ordinary and proper course, the legal interest in the mortgage, and the right to receive the £500, would have remained vested in Isaac Lambert and James Lambert alone, and they would have been the persons to receive the money due on the mortgage after the death of Isaac Rhodes, and they, and they only, would have been the persons liable to make the payment to Mrs. Blamires of interest upon the £466 13s. 4d.

Now, what was the course which things actually took after the death of Isaac Rhodes? In the month of December after his death Mrs Blamires applied to James Rhodes, one of the executors of Isaac Rhodes, for payment of the amount which had always been previously paid to her by Isaac Rhodes, and that payment was made by James Rhodes, and it continued to be made by him down to June, 1874, a period of nearly eleven years. That payment was allowed by all the executors of Isaac Rhodes. It appears that a portion of the income of the estate of Isaac Rhodes was received by James Rhodes, and whilst he so received it he deducted from the moneys which he brought into account the sums which he had paid to Mrs. Blamires. It appears that after three or four years he ceased to receive either all or so much as he had previously received, and John Rhodes appears to have been then the principal receiver, at any rate he received a portion of the rents, and out of that portion he from time to time made payments to James Rhodes of the half-yearly 785] \*amount of interest due to Mrs. Blamires in order that

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James should pay them, as he accordingly did, to Mrs. Blamires. The sums which in the course of those eleven years were so paid by one or other of the executors to Mrs. Blamires were deducted by them in the settlement which they made from half-year to half-year with their brothers and sisters, who were interested under the will of Isaac Rhodes. It appears that Isaac Rhodes left seven children, of whom three were executors and four were not, and the habit of the family was to make a half-yearly settlement, dividing the income, after all due deductions, amongst the seven children, and amongst the deductions which were made from the sums so divided was the sum which was paid half-yearly to Mrs. Blamires.

Now, I think I am bound to assume as against the defendants that that deduction was properly made. There is one view of the case in which it might have been properly made, viz., if Isaac Rhodes had received the £350, and if, by agreement between himself and his co-trustees, the Lamberts, it had been arranged that he should be deemed to be the holder of the £350. I infer that to have been the case, because in that way, and in that way only, can I make the conduct of the defendants proper, legitimate, and lawful, as

against their own cestuis que trust. Well, the matter does not stop there, for the £500, which remained due on the mortgage at the date of Isaac Rhodes' death, was subsequently received. It appears that the receipts were given, at any rate sometimes, in the name of the executors of the original testator Edward Lambert, and they were in every case but one signed by James Rhodes. last of them was given on the 21st of February, 1867. if the supposition which I have made, or the inference which I have drawn, is correct, it would follow that that money, or so much of it as went to meet the £466 13s. 4d., would be received by the estate, or would commingle with the estate, of Isaac Rhodes. If the inference I have drawn is wrong that money would have found its way into the hands of the If it had found its way into the hands of the Lamberts it is almost incredible that the executors of Isaac Rhodes should have continued to pay interest upon it.

Now what happens is this—of the £500 so received it appears \*that £166 13s. 4d. found its way into the [786 hands of James Lambert as representing the one-third which went over to him upon Mary Berry's death. Another similar sum found its way into the hands of Isaac Lambert, as representing the one-third to which he was beneficially en-

titled. But the remaining one-third never found its way into the hands of the Lamberts, as it ought to have done if the £500 had remained vested in them as the surviving trustees and executors of their father, but it was commingled with the estate of Isaac Rhodes in this sense, that James Rhodes says he paid £100 of it to his brothers (that is in dispute), but the remaining £66 13s. 4d. he says he can only account for by saying that it went to pay interest. That is, he means to say it went into the estate of Isaac Rhodes against the sums which were paid half-yearly by that estate to Mrs. Blamires, and I have no evidence to the contrary.

Now it appears to me clear that, if the conclusion I have come to is wrong, that £500, or the balance of it after paying James and Isaac Lambert their respective shares, would have found its way into their hands as surviving trustees. It appears to me clear that it did not find its way into their hands, and that the executors of Isaac Rhodes knew that it did not, because, after the last payment in respect of the mortgage debt took place on the 21st of February, 1867, they went on for another seven years paying interest to Mrs. Blamires, as though that money had come to the estate of I think therefore I am bound to come to the Isaac Rhodes. conclusion that by the arrangement between the parties Isaac Rhodes had made himself primarily responsible for the whole of the £466 13s. 4d., and the plaintiffs therefore have rightly brought their action only against the persons who represent his estate.

No doubt a release has been shown by which the two Lamberts alone release Hartley, acknowledging that they have received the whole amount due on the mortgage. may be a question whether that release is evidence against the present plaintiff. But even if it be, it appears to me consistent with the conclusion to which I have come, because undoubtedly James Lambert and Isaac Lambert were the legal personal representatives of the original testator Ed-787] ward Lambert, and if, by an arrangement of \*the kind which I have inferred to have been made, they had allowed the money to be received by Isaac Rhodes, they, nevertheless, were the proper persons to give a discharge to Therefore the recital that they had received the mortgagor. the money is consistent with its having been received by the person who they agreed should receive it.

I must therefore make a declaration that the three defendants, the executors of Isaac Rhodes, are, as his repre-

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sentatives, liable to make good the £466 13s. 4d., with the arrears of interest. The £466 13s. 4d. must be paid into court.

From this decision the defendants, the executors of Isaac Rhodes, appealed. The appeal was heard on the 24th of May, 1878.

Cookson, Q.C., and Bardswell, for the appellants, followed

the same line of argument as in the court below.

Before the argument was concluded, however, they elected to waive the objection for want of parties.

North, Q.C., and W. Barber, for the plaintiff, were not

called on.

James, L.J.: The appellants not insisting on the objection for want of parties, we do not desire to hear the counsel for the respondent. I think they are quite right in not insisting on the objection; for it would not have been worth while to make Isaac Lambert, who was in New Zealand, and the executors of James Lambert, parties for the sake of getting contribution from them. It would have been attended with great expense, and no good would have been

gained by it.

Under these circumstances the question who ought to be made parties to an action for a breach of trust under the present practice, which Mr. Bardswell has represented as of such pressing importance to the junior members of the bar, cannot now be decided, but must be adjourned to some future day, as it does not arise in the present case. But it is obvious that there was a legacy due to this lady which was not paid. There were assets sufficient for its payment, therefore the executors ought to have \*paid it, or ought [788] to have appropriated and invested it. It is no answer to her complaint that the other executors may have joined in the breach of trust. What the executors did among themselves is a matter really unimportant in this view of the As the defendants are unquestionably liable and the question of parties is waived, the plaintiff is clearly entitled to enforce that liability in this action. The judgment must therefore be affirmed, and the defendants must pay the costs of the appeal.

BAGGALLAY, L.J.: I am of the same opinion. Mr. Justice Fry decided the case on a ground which made it necessary for him to consider the question of pleading, namely, whether the proper parties were before the court. In this court the objection for want of parties has been waived. Therefore it is unnecessary to express an opinion on that

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point. There can be no doubt that the defendants are liable. The judgment of the court below must therefore be affirmed.

Bramwell, L.J., concurred.

Solicitors for plaintiffs: Torr & Co., agents for Lancaster & Wright, Bradford, Yorkshire.

Solicitors for defendants: Lauton & Jaques, agents for A. Neill. Bradford.

[8 Chancery Division, 789.]

V.C.H., Feb. 19, 1877. C.A., June 1, 1878.

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[1876 W. 887.]

Gift of "Moneys that may be left after my Decease"-Residuary Gift.

A testator by his will directed his trustees and executors to pay his debts and funeral and testamentary expenses out of his personal estate, and if that should be insufficient, he charged them on his real estate; and he bequeathed all the rest and residue of his personal estate to his daughters. By a codicil, after making alterations in the dispositions of his real estate, he proceeded: "As to all moneys that may be left after my decease, I give and bequeath the same" upon the trusts therein mentioned: Held, by Hall, V.C., that the gift in the codicil was a residuary bequest of the personal estate revoking the residuary gift in the will.

Held, on appeal, that the gift in the codicil was only a gift of the money which was in the testetoric headers his death and that appeals to this exerction that

was in the testator's hands at his death; and that, subject to this exception, the residuary gift in the will remained in force.

RICHARD WILLIAMS, by will dated the 18th of July, 1863, in the first place desired his debts, funeral and testamentary expenses to be paid, and directed the same to be paid out of his personal estate, and if that should be insufficient, then he charged the said debts and expenses upon all his real estates ratably. He appointed trustees and executors, and then disposed of his real estates as therein Provided always, and he directed his trustees mentioned. and their heirs within two years after his decease to cut or sell all the timber and trees then growing in or upon his farms called Tyddyn Sheffrey and Cwm Idiol, and to pay and apply the produce and proceeds towards the discharging of any debts due from him at the time of his decease. He also directed his trustees to sell and dispose of all the farming stock and furniture that might be at Pentrebach at his death, and pay and apply the proceeds thereof in like manner towards liquidating his debts; and he gave and bequeathed all the rest and residue of his furniture, and all other his personal estate of what nature or kind soever to his daughter Jane Williams, her heirs and assigns.

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The testator, by a codicil dated the 9th of January, 1866, after making various alterations in the disposition of his real estates, proceeded as follows: "As to all moneys that may be left after my decease, I give and bequeath the same unto my said children, "William, Jane, and Mary, [790 share and share alike, but in trust to the trustees named in my will to be placed by them on mortgage or in the public funds, and the interest accruing therefrom to be divided equally between them, and after their decease unto my grandchildren in equal proportions."

The testator died on the 5th of July, 1871, and a suit for the administration of his estate now came on for further consideration. One question that arose was, whether the above gift in the codicil passed the residuary personal estate.

The action was heard before Vice-Chancellor Hall on the

19th of February, 1877.

Dickinson, Q.C., and Kekewich, Q.C., for Jane Williams. W. Pearson, Q.C., and J. A. Creed, for parties claiming under the gift in the codicil.

Cracknall, for other parties. Freeling, for the trustees.

HALL, V.C.: It appears to me upon this will and codicil that the gift in the codicil of all moneys which may be left after the testator's decease is a residuary bequest. testator by his will directed all his debts, funeral and testamentary expenses, to be paid, and he directed the same to be paid out of his personal estate, and if that should be insufficient, then he thereby charged the debts upon his real estate; and then he made certain provisions for paying his debts by means of raising money, and from the income to be received for a couple of years arising from the timber; and then he directed the farming stock and furniture to be sold, and the proceeds to be applied towards liquidating his debts; and then he gave and bequeathed all the rest and residue of his furniture, and all other his personal estate of what nature or kind soever, to his daughter Jane Williams, her heirs and assigns. Of course, that residuary gift was a gift of the furniture and other portions of the personal estate, subject to the directions before contained for the payment of his debts; and when in the codicil he says, "as to all moneys that may be left after my decease," he must, I consider, \*have been referring to and describing that rest and residue of his personal estate which there would be after paying the debts which are directed to be paid by the will. It therefore comes to this, that it is a gift of the rest and residue of what shall remain after paying the debts,

the whole of the personal estate being applicable to that purpose. In a rough and not an uncommon mode of describing property, the word "moneys," which is used in this codicil, appears to me to be descriptive of his personal property generally which would remain after paying his debts. That being so, I hold it to be a residuary bequest passing the whole of the personalty.

Jane Williams appealed from this decision. The appeal

was heard on the 1st of June, 1878.

Kekewich, Q.C., for the appellant: I contend that the Vice-Chancellor was wrong in holding a gift of the moneys remaining to be a gift of the residuary personal estate, and that the gift by the codicil is merely a specific gift of the testator's money properly so called. The most material item is a mortgage for £2,000, which forms part of the residuary personal estate, and would not pass under a gift of "money." Langdale v. Whitfeld (') was relied on below, but the circumstances there were very special, and the case really is in my favor, for it lays down the general rule very strongly in accordance with Lowe v. Thomas (2) which is the leading case on the subject.

W. Pearson, Q.C., and J. A. Creed, for parties claiming under the gift in the codicil: It is not very material to the parties how this case is decided, for if the gift in the codicil is a gift of money only it is a specific gift, and the other personalty must be applied first. But we submit that the gift in the codicil is a new residuary gift: Rogers v. Thomas (\*); Dowson v. Gaskoin (\*); Stocks v. Barré (\*). 792] \*[BAGGALLAY, L.J.: There is no express revocation of the residuary gift in the will; cannot the two stand

together?

Cracknall, in the same interest, referred to Theobald on  $\mathbf{W}$ ills (').

Freeling, for the trustees.

James, L.J.: The appellant is entitled to have her rights declared and ascertained, though it may be, as Mr. Pearson has pointed out to us, that she will not gain much by this appeal, because it cannot be doubted that if the gift of the money is a specific gift, the rest of the property must go in exoneration of it to pay the debts and the funeral and testamentary expenses and costs of suit. I think, whatever may be the meaning of the word "moneys" under other

<sup>(1) 4</sup> K. & J., 426. (2) Kay, 869; 5 D. M. & G., 815.

<sup>(3) 2</sup> Keen, 8.

<sup>(4) 2</sup> Keen, 14. (5) Joh., 54.

<sup>(4)</sup> Page 59.

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circumstances, and whatever enlarged meaning has been given to it by reason of the context, the context here is opposed to such extention. Lord Justice Baggallay has drawn the attention of counsel to the circumstances that there is a clear residuary bequest in the will, and that in the codicil there is no revocation of that bequest, but merely a gift of "all moneys that may be left after my decease." The natural meaning of that expression is, not "all moneys that may be left after my debts and funeral and testamentary expenses have been paid," but "all moneys that may be left at my decease." Therefore we have a gift of the residue of the personal estate by the will, and we have a gift by the codicil of moneys left "after my decease." Those two dispositions may well stand together, and there is a well known rule that the original gift is not revoked unless it be by express words or necessary implication. do not find here express words of revocation, and I do not find a plain implication amounting to a revocation. fore think that the original bequest must stand, and that the gift in the codicil is a gift of moneys as a specific bequest.

BAGGALLAY, L.J.: I am of the same opinion. Both parties have considered the case of Langdale v. Whitfeld ('), before Vice-Chancellor Wood, as an authority in their favor. I am disposed to concur with Mr. \*Kekewich in [793] thinking that it is a decision in his favor, not as regards the particular facts of the case, but as regards the principle which is enunciated in it. I entirely agree with what the Vice-Chancellor there stated (\*). "The authorities have clearly settled that prima facie, and in the absence of anything in the will to indicate a different intention, the word 'moneys' will be confined to ready money actually in hand. A different intention may be gathered from the words of the will, and where that is the case effect will be given to it." He then went on to consider the particular circumstances of that case, and, having regard to them, he came to the conclusion that the word "moneys" in the codicil comprised not only money in hand, but all moneys due to the testator whether upon security or otherwise.

What do we find here to induce us to give to the word "moneys" in this codicil a different meaning to that which it would ordinarily have in the absence of any indication of such intention? The only argument I have heard which appears to be supported apparently by authority is that which Mr. Pearson rested upon, the fact that where you have a clear direction to pay funeral and testamentary ex-

<sup>(1) 4</sup> K. &. J., 428. 25 Eng. Rep.

In re Orr Ewing's Trade-marks.

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penses followed by a gift of all moneys, in that case it has been held that the word "moneys" is equivalent to personal estate. But that is not the case here. In the same document which provides for the payment of debts, funeral and testamentary expenses, we find an actual gift of residue in the terms commonly used to express a gift of residue, and therefore it is clear that the testator knew what words to use when he intended a gift of residue. We find, then, a clear gift of the residue contained in the will, and no indication of an intention to revoke it. I am, therefore, of opinion that the gift in the codicil is only a specific gift of

the testator's money.

Bramwell, L.J.: I am of the same opinion. The cases as cited by Mr. Pearson show that under the word "money" things may pass which are not properly so called. It seems to me that the way in which the conclusion was arrived at in those cases was this: If a will directs various payments to be made which must be paid out of the whole personal 794] \*estate, a gift of the money which remains is then held to be a residuary clause. But this does not apply where there is a residuary clause already. Mr. Pearson's argument is this, not that we are to interpret this as a residuary clause, because there is none, but we are to construe the codicil as revoking the residuary clause in the will. Now that can only be done by express words, or because the two dispositions are inconsistent. The proper way to try this is to read them together. The testator (taking them together) gives all the residue of his personal estate whatsoever, except the moneys that may be left after his decease, to his daughter Jane Williams. What is there incongruous in that? I think, therefore, that the gift in the codicil must be held to be only a gift of money.

Solicitors: Gregory, Rowcliffes & Rawle; Fallows & Brown; John Cann.

[8 Chancery Division, 794.]

V.C.H., Dec. 9, 15, 1877. C.A., May 6, 7; June 7, 1878.

In re ORR EWING'S TRADE-MARKS.

Trade-Mark-Registration-Committee of Experts-Distinction from other Trade-Marks-38 & 39 Vict. c. 91, s. 10-Trade-Marks Rules, 1876, rr. 58, 59, 62.

When a label for cotton goods, which had been used as a trade-mark before the passing of the Trade Marks Registration Act, 1875, has been placed by the Committee of Experts, appointed under the 59th Rule of the Rules for Registration of Trade-Marks, in the second class, as not being a trade-mark as defined by the act, the decision of the committee is, in general, final; and a judge of the Chancery

Ex parte Adamson. In re Collie. 1878

Division ought not to order the registration of such label except under special circumstances; as, for instance, that the committee have proceeded on a wrong

The decision of Hall, V.C., reversed.

## [8 Chancery Division, 807.]

C.A., May 23, 30; June 6; July 4, 1878.

## \*Ex parte Adamson. In re Collie.

Proof in Bankruptcy—Partners—Debt incurred by Fraud—Joint and Several Liability—Right of Election to prove against Joint or Separate Estates—Time when Election must be made—Estoppel by Receipt of Dividend—Refunding Dividend—Interest—Bankruptcy Act, 1869, ss. 4, 31, 49.

Held, by James and Baggallay, L.JJ. (Bramwell, L.J., dissenting), that where a partnership debt has been incurred by means of a fraud on the part of the partners the defrauded creditor has a right to prove at his election against either the joint estate of the firm or the separate estates of the partners, even though no judgment has been recovered by him against the partners:

Held, by Bramwell, L.J., that in such a case, judgment not having been recovered

against the partners, there is no right to prove against the separate estates.

When a creditor has such a right of election he does not lose it merely because the has proved and received dividend. But he may change his election on [808 refunding the dividend which he has received, with interest at 4 per cent, though he cannot disturb any dividend already paid.

This was an appeal from a decision of Mr. Registrar Murray, acting as Chief Judge in Bankruptcy, rejecting a proof for £120,197 10s. 11d., tendered by John Adamson against each of the separate estates of Alexander and William Collie, partners, who were adjudicated bankrupts on

the 19th of August, 1875.

A. and W. Collie were merchants trading in London and at Manchester, under the firm of Alexander Collie & Co. In the year 1872 Adamson arranged with the firm to enter with them into speculations in the purchase and sale of cotton on joint account, for which purpose he was to supply the requisite capital by accepting bills of exchange drawn upon him by them. Adamson was to receive half the net proceeds of the ventures. This arrangement was carried out, and he from time to time accepted bills to a large amount, which were discounted by the firm. The bills were renewed from time to The firm from time to time wrote to Adamson, sending him accounts of purchases and sales of cotton on the joint account. On the 15th of June, 1875, the firm stopped payment, and immediately after this Adamson discovered that the alleged purchases of cotton on the joint account were almost entirely, if not entirely, fictitious, and that no cotton, or at any rate a very small quantity, had ever been purchased on that account, and Alexander Collie confessed that

he had deceived him. After the stoppage of the firm Adamson was compelled to pay his acceptances when they matured, and his proof of £120,197 10s. 11d. was for the moneys which he had thus paid. In July, 1875, Adamson commenced some legal proceedings against the bankrupts in the United States of America, with the view of attaching a judgment debt, which had been recovered by them there. Those proceedings were abandoned in November, 1875, and Adamson, on the 22d of March, 1876, notified to the trustee in the bankruptcy that he intended to prove against the joint estate of the bankrupts for the amount of the acceptances, and his proof was on the 1st of April, 1876, provisionally admitted by the trustee at £115,000. The trustee had on the 16th of March, 1876, issued the proper statutory 809] notices of his intention to declare a \*first dividend on the joint estate of the bankrupts, and on each of their separate estates. A first dividend of 9d in the pound on the joint estate was on the 17th of May, 1876, paid by the trustee to Adamson in respect of the £115,000. On the 5th of December, 1876, Adamson gave the trustee notice of his intention to claim to rank as a creditor against the separate estates of the bankrupts in respect of the acceptances, and on the 30th of April, 1877, he tendered a proof for £120,197 10s. 11d. against each of the separate estates. The claim was described in Adamson's affidavit as being "in respect of moneys of mine, received by the firm of Alexander Collie & Co. on account of a certain venture in cotton in which I was engaged jointly with them, and misapplied by them in breach of the trust imposed upon them in respect of such joint venture." The trustee rejected the proofs, and Adamson applied to the court to order them to be admitted, asking at the same time that he might be at liberty to withdraw his proof against the joint estate, and offering to refund or give credit for all dividends received by him upon his proof against the joint estate.

Adamson deposed that his proof against the joint estate was made without any intention of electing between the separate estates and the joint estate, in ignorance of his right so to elect, and also in ignorance of the relative values of the joint and separate estates. He said that in November, 1876, he read in a Glasgow newspaper a report of the hearing of an application by another creditor of the bankrupt, who, under similar circumstances to his own, was allowed to prove against the separate estates, and that previously to reading that report he was not aware that he had any right to elect between the joint estate and the separate estates.

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After reading that report he immediately communicated with his solicitors on the subject, and the notice of the 5th of December, 1876, was sent to the trustee. Until December, 1876, he was unaware that it would make any difference to him whether he proved against the joint or against the separate estates.

It appeared probable that a very much larger dividend would be paid on the separate estates than on the joint estates.

The Registrar affirmed the decision of the trustee, rejecting the proofs. He held that Adamson would have been originally entitled \*to elect whether he would prove [810 against the joint estate or against the separate estates, but that having made his proof he could not change it after the receipt of a dividend. His honor dismissed the application with costs.

Adamson appealed.

Southgate, Q.C., Joseph Brown, Q.C., De Gex, Q.C., and G. W. Lawrence, for the appellant: Ex parte Bolton (') shows that the receipt of dividend does not estop the appellant from now proving against the separate estates, as he proved against the joint estate in ignorance of his rights. The appellant's debt having been incurred by the fraud of the partners their liability in equity is joint and several, and, that being so, Ex parte Rowlandson (') shows that the appellant had an election to prove against either the joint estate or the separate estates. No one can be prejudiced by his changing his election now, if he refunds the dividend which he has received, for of course he cannot disturb any dividend already paid on the separate estates. No one can be said to have changed his position in consequence of what the appellant has done. It cannot be said that he has elected, for he made his proof in ignorance of his legal rights, in ignorance of the fact that there were separate estates, and in ignorance of their value compared with that of the joint estate, nor had he full knowledge of the facts relating to the fraud. In Ex parte Downes ('), which will be relied on against us, a mortgagee had elected to abandon his security, and afterwards sought to be restored to his original position. That is quite different from the present case, for the property might have been realized by the assignee and distributed.

[James, L.J.: You say that the change you ask for will be no *injuria* to the other creditors, though it may cause

damnum to them.

<sup>(1)</sup> Buck, 7.

Ex parte Adamson. In re Collie.

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BRAMWELL, L.J.: As a general rule money paid under a mistake of law cannot be recovered.

James, L.J., referred to Ex parte James (').] \*In Ex parte Liddel(') Lord Eldon came to the conclusion upon the facts that there had been a deliberate elec-Lord Eldon explains the case in that way: Ex parte Bollon ('); Ex parte Adam ('); Ex parte Bollon (') is on all fours with the present case. Ex parte Husbands (\*) is no doubt against us, but Ex parte Bolton was not cited there. and, moreover, the decision was reversed on appeal ('). Ex parte Dixon (\*) it was clear that there had been a deliberate election, and, moreover, the order asked for was afterwards consented to by the assignees. In Ex parte Law (') it was held that receipt of dividend did not make a con-The doctrine of election cannot be applied cluded election. as against a man who has acted without a knowledge of all the facts, or who, before the fund is distributed, changes his mind.

[JAMES, L.J.: Has the doctrine that money paid under a mistake of law cannot be recovered, ever been applied to a case of election?]

Spread v. Morgan (") shows that knowledge of the doctrine of election is not to be imputed as a matter of legal obligation. In order to bind a party by election, it must be shown that with knowledge of all the facts and of the obligation to elect he deliberately intended to elect: Edwards v. Morgan ("); Pusey v. Desbouvrie ("); Dillon v. Parker ("); Kidney v. Coussmaker ("); Kelly v. Solari ("); Townsend v. Crowdy ("); Wilson v. Thornbury ("); Story's Equity ("). In the present case it is said that the appellant must be taken to have known that he had a right, which the trustee now says that he had not.

[JAMES, L.J.: Is it not the duty of a trustee to inform his cestui que trust of his legal rights before he takes a release from him?]

A court of equity has power to relieve against mistakes 812] of law \*as well as of fact: Stone v. Godfrey (");

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(1) Law Rep., 9 Ch., 609; 10 Eng. R., 619.
(2) 2 Rose, 34.
(3) Buck, 10, note (a).
(4) 2 Rose, 36.
(5) Buck, 7.
(6) 5 Madd., 419.
(7) 2 Gly. & J., 4.
(8) 2 M. D. & D., 312.
(9) Mont. & Ch., 111; 3 Deac., 541.
(10) 11 H. L. C., 588.
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Cooper v. Phibbs (1); Earl Beauchamp v. Winn (2). But in the present case the mistake was not as to the law, but as to a very technical rule of the Court of Bankruptcy: Ex

parte Bevan (\*).

That there was originally the right of election which we assert is clear for the fraud created a several liability on the part of the partners, who were parties to it, in addition to their joint liability in respect of the debt. In equity fraud always creates a joint and several liability to replace the money obtained by the fraud, and in bankruptcy this gives a right to prove either against the joint estate or the separate estates of the partners. And a partner who is ignorant of the fraud committed by the partnership is liable: Brydges v. Branfill ('); Lindley on Partnership ('); Story on Partnership ('). The joint and several liability in the case of fraud is shown by New Sombrero Phosphate Company v. Erlanger ('); Lovell v. Hicks ('); Sadler v. Lee  $(^{\bullet})$ .

BRAMWELL, L.J.: In bankruptcy you prove for a debt,

not for a fraud.

BAGGALLAY, L.J., referred to the Bankruptcy Act, 1869, **s**. 31.]

The bankrupt is not released by his order of discharge from debts incurred by fraud: sect. 49.

[James, L.J., referred to Ex parte Unity, &c., Banking

Association (10).]

That we have the right of proof is also shown by Ex parte Turner ("); Rapp v. Latham ("), a case very like the present case: Robson on Bankruptcy ("). Where money has been obtained by fraud, the person defrauded has an election at law to waive the tort and sue for the money; but though the action for tort is waived, the tort is not waived altogether. An innocent partner is liable for the fraud of his co-partner: Barwick v. English Joint Stock Bank ("); Mackay v. Commercial Bank of \*New Brunswick ("); [813 Swire v. Francis (1°). At law the liability for a tort was joint and several.

BRAMWELL, L.J.: There could not be a plea in abate-

ment.]

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) Law Rep., 2 H. L., 149.
                                                          (9) 6 Beav., 824.
                                                          10) 8 De G. & J., 68.
   (2) Law Rep., 6 H. L., 228; 6 Eng.
                                                          (11) Mont. & Mac., 255.
R., 37.
                                                          (12) 2 B. & A., 795.
   (*) 10 Ves., 107, 109.
(*) 12 Sim., 869.
                                                         (13) 3d ed., p. 666.
(14) Law Rep., 2 Ex., 259.
   (*) 4th ed., p. 1173.
    (f) 4th ed., p. 283.
  (*) 5 Ch. D., 73; 21 Eng. R., 798.
(*) 2 Y. & C. Ex., 472, 487.
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(15) Law Rep., 5 P. C., 894, 411; 9 Eng. (16) 3 App. Cas. 106; 24 Eng. R., 56.

But judgment against one of several joint tort-feasors was a bar to an action against another: Brinsmead v. Harrison ('). The plaintiff may recover separately against each, but he can have but one satisfaction: Livingstone v. Bishop ('). The evidence shows that both the partners were in fact cognizant of the fraud.

[James, L.J.: Prima facie the false representation was made by the firm. It is for your opponents to show that

either of the partners was innocent.]

Winslow, Q.C., and J. Linklater, for the trustee: proof is admitted against the separate estates there will be no surplus for the joint creditors; if it is not admitted there will be a surplus. There has been a complete election by the appellant within the rule in bankruptcy. It is very important that a creditor who has a right to elect should elect before he takes a dividend. The cases show that the rule formerly was that he could not alter his election after the receipt of dividend, and it is more important now than it was formerly. Formerly the assignee was bound to take notice only of debts which were proved, and might divide the assets among those creditors who had proved. altered by the Bankruptcy Act, 1861, and now the trustee must reserve funds to answer provable debts which are mentioned in the debtor's statement of affairs, even though they have not been proved: Bankruptcy Act, 1869, ss. 41-43; Bankruptcy Rules, 1870, rule 312. In the present case the trustee may have reserved money for other creditors on the separate estates on the footing of the appellant having The rule laid down elected to prove against the joint estate. in Cooke's Bankrupt Laws (\*) is that the election must be made before the receipt of a dividend. The same rule is laid down in Lindley on Partnership (\*). Ex parte Bentley (\*) 814] is an authority to this effect. Ex \*parte Rowlandson (\*) was the first case which decided that in the case of a joint and several liability there could not be proof against both the joint estate and the separate estates, but that the creditor must make his election. In Ex parte Bond (') a similar attempt was made without success. creditor is entitled to delay his election until he knows the state of the accounts, but he must elect before the receipt This is the rule. Ex parte Bolton (\*) was an exception under very peculiar circumstances.

<sup>(1)</sup> Law Rep., 7 C. P., 547; 8 Eng R.,

<sup>(\*) 1</sup> Joh. (Supreme Court New York), 289.

<sup>(8)</sup> Vol. i, p. 275.

<sup>(4) 4</sup>th ed., p. 1210. (5) 2 Cox., 218.

<sup>(6) 8</sup> P. Wms., 405.

<sup>(1) 1</sup> Atk., 98. (8) Buck, 7.

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[BAGGALLAY, L.J., referred to Ex parte Carne (').] The question there was whether a surety was bound by the election of the principal creditor. Ex parte Downes (\*) is in our favor.

[James, L.J., referred to Ex parte Capot (\*).]

Ex parte Liddel (') is also in our favor. In Ex parte Bevan (\*) Lord Eldon says that a proof against the joint estate implies a contract by the creditor with the other joint creditors that he and they shall share in the surplus of the separate estates. In Ex parte Solomon (\*) it was held that a creditor who had a lien on the property of the bankrupt had, by proving his debt, voting in the choice of assignees, and signing the certificate, elected to give up his lien. parte Husbands (') shows that, unless there are special circumstances, the election must be made before receipt of dividend. The decision was reversed by the Lord Chancellor (\*), because the dividend had only been declared, not received.

All the prejudice has taken place by the vidend. What difference is there between [JAMES, L.J.: declaration of dividend. not taking the dividend out of the trustee's hands and re-

paying it to him the next day?

In Ex parte Law(\*) the circumstances were very special; Ex parte Dixon (") is clearly in our favor; Ex parte Davenport (11) \*shows that a mistake of law is not a [815] sufficient reason for allowing the change of election. rules as to proof in bankruptcy are now made a part of the statute law by sect. 25 of the Judicature Act, 1873. cases cited as to the general doctrine of election do not apply, and indeed in most, if not in all of them, the mistake was one of fact. The court will not relieve against a mistake of law in a case of a mere money demand: Rogers v. Ingham (13).

But the appellant never had any right to prove against the separate estates. The bankrupts acted as his bankers in the transactions. It was a simple debtor and creditor If the fraud gave him any right, it was a right transaction. of action for the misrepresentation, and damages not having been recovered, there is no right in such a case to prove in the bankruptcy: Bankruptcy Act, 1869, s. 31; Ex parte

Baum (").

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(1) Law Rep., 8 Ch., 468.
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<sup>(\*) 1</sup> Rose, 96. (\*) 1 Atk., 219.

<sup>(4) 2</sup> Rose, 84.

<sup>(\*) 10</sup> Ves., 107.

<sup>(6) 1</sup> Gly. & J., 25. (7) 5 Madd., 419.

<sup>25</sup> Eng. Rep.

<sup>8) 2</sup> Gly. & J., 4.

<sup>(\*)</sup> Mont. & Ch., 111; 8 Dea., 541.

<sup>(10) 2</sup> M. D. & D., 812.

<sup>(11) 1</sup> M. D. & D., 813. (12) 3 Ch. D., 351; 18 Eng. R., 551. (13) Law Rep., 9 Ch. 678.

[JAMES, L.J., referred to Phosphate Sewage Company v. Hartmont(').

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Barwick v. English Joint Stock Bank (\*) and Mackay v. Commercial Bank of New Brunswick (\*) were actions of deceit; there could have been no right of proof in bankruptcy. The rule as to the liability of partners in respect of torts is laid down in Lindley on Partnership ('), and his observations show that it is very difficult to distinguish between the liability in equity in cases of contract and in cases of tort.

[James, L.J.: In a court of equity the liability in a case of fraud was a joint and several one to restore the money fraudulently taken, not a liability in damages. You could not sue in equity on an ordinary partnership contract, except in the administration of the assets of a deceased partner.]

If the ordinary rule of equity that partners are jointly and severally liable for the partnership debts does not give a right of proof in bankruptcy against the separate estates, why should that right exist in a case of fraud? The provisions of sect. 31 of the Bankruptcy Act, 1869, that de-816] mands in the nature of unliquidated \*damages in cases of tort shall not be provable in bankruptcy, does not depend upon the fact that the damages are unliquidated, but upon the fact that they arise out of fraud. Ex parte Unity, &c., Banking Association (\*) is distinguishable; in Ex parte Turner (\*) the money was clearly in hand. Brydges v. Branfill('), and all the cases of that class, depend on the principle that partners are jointly and severally liable in a court of equity. That is not so in bankruptcy. In the present case the money is not traced into the hands of either of the partners. In Ex parte Poulson (\*), each partner had committed a breach of trust. In Ex parte Geaves (\*) the bankrupt had got the money, and had made himself personally liable as a trustee. There is no right to proof against the separate estates unless a joint and several liability has previously been established in a suit in equity or in an action Upon the evidence, the true conclusion is that the appellant was a partner with the bankrupts, the three constituting one firm. A partner cannot prove against the estate of his copartner until all the creditors have been paid in full, except in the case of a fraud which could not have been discovered: Read v. Bailey("); Ex parte Lodge("); Ex

<sup>(1) 5</sup> Ch. D., 394; 22 Eng. R., 157. (2) Law Rep., 2 Ex., 259.

<sup>(8)</sup> Law Rep., 5 P. C., 394; 9 Eng. R., 202.

<sup>(4) 4</sup>th ed., p. 373. (5) 3 De G. & J., 68.

<sup>6)</sup> Mont. & Mac., 255.

<sup>(&</sup>lt;sup>7</sup>) 12 Sim., 869.

<sup>(°)</sup> De G., 79.

<sup>9) 8</sup> D. M. & G., 291. (10) 3 App. Cas., 94; 24 Eng. R., 56.

<sup>(11) 1</sup> Ves., 166.

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parte Yonge ('). A joint adventure constitutes a partner-

ship: Lindley on Partnership (').

Southgate, in reply, as to the right of proof only: It is clear, on the authorities, that the liability to replace the money was joint and several in equity, and if so, it follows that there is a right in bankruptcy to prove either against the joint or the separate estates.

[JAMES, L.J., referred to Earl of Dundonald v. Master-

man(').

July 4. James, L.J., delivered the judgment of himself

and Baggallay, L.J., as follows:

There are two questions to be decided in this case. first is, \*whether Mr. Adamson, the appellant, is to [817] be allowed after proving against the joint estate and receiving a dividend on that proof, to prove against the separate estates, withdrawing his joint proof and returning what he has received. The Registrar was of opinion that he had originally a right to prove against either the joint estate or the separate estates at his option; but that, having proved against the former, he must be deemed to have elected between the two rights, and is bound by that election. rule which was established by the courts (it is difficult to see on what principle or by what authority) a creditor having a joint legal or equitable demand against a partnership, and a several one against the members, or some of the members, of the same partnership, was not entitled to go against the joint estate and the separate estates, but was entitled to choose between them; and it was laid down in the books that the election must be made before the receipt of a divi-But case after case has been cited to us in which creditors were permitted to alter their election, and after having gone against the one estate to go against the other. In the case before us the question is not one of election at all. It is quite clear that Mr. Adamson never dreamt of electing, never knew anything about electing, and never knew that he had the rights between which he is deemed and adjudged to have elected. To say that such a man had elected is to say the thing that is not, and it is no more open to a court or a judge to say the thing which is not than it is to other men; and the question, then, really is, not whether he had elected, but whether he is estopped from asserting one of two rights, which he says he had, by reason of his having successfully asserted the other of them. Why should he be? It is admitted (admitted, I mean, for this part of

<sup>(1) 3</sup> V. & B., 81.

<sup>(\*) 4</sup>th ed., p. 55.

<sup>(\*)</sup> Law Rep., 7 Eq., 504.

the case) that if he had ever done anything he could have now made his proof against the separate estates. Then what has he done, as between him and the other creditors of those estates, to give them any right at law, or in equity, or in common sense, to interpose between him and the proof which he tenders? Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing \*something, by reason of what he had said or done. or omitted to say or do. In bankruptcy a creditor who does not come in and make the proof he is entitled to make runs this risk and incurs this penalty—that he cannot undo anything which has been done. The other creditors retain any dividend which has been declared, and he can only go against the assets which may chance to be remaining; so no harm But the appellant has gone against the joint estate and taken a dividend. What harm is that to the separate creditors? Of course they would be entitled to any possible surplus of the joint estate, but as the dividend is to be paid back, even that contingent and imaginary right is restored to them as fully and beneficially as if the dividend had never What harm is done to the creditors of the joint estate? They get the dividend back into their estate, and the only thing which was suggested to us was the inconvenience to the trustee of having to make a fresh distribution of these new assets. But it is the main duty of a trustee to distribute any assets which may from time to time come to his hands, and, even if he had to make a new sum in arithmetic and to send out fresh letters and fresh checks every quarter or every month, it does not seem to be an inconvenience to be put into competition with the inconvenience which would be suffered by a creditor who is deprived of a sum of money to which he is legally, equitably and morally entitled. If Mr. Adamson has the right which he asserts that he has, he has not by what he has done forfeited it.

The second question, therefore, remains to be considered, Has he that right? The counsel for the respondent having contended that Mr. Adamson must be taken to have knowingly elected between two alternative rights which he must be taken to have known, next argued that he had no right of proof against the separate estates of the partners. The ground for the separate proof is this: Mr. Adamson was induced to accept bills of exchange for a very large amount,

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on the representation that they were bills, or renewals of bills, representing the purchase-money of large quantities of cotton, stated to have been purchased on the joint account of Mr. Adamson and the two Collies, and continued to be held by them on such joint account. This representation was wholly, or almost wholly, fictitious, and there is no doubt that Mr. Adamson was \*cheated out of the [819] acceptances which he gave, and which he had to meet when they matured. That Alexander Collie was guilty of the frauds there is no dispute, and, in the absence of evidence to explain his part of the transaction, it is impossible not to hold that William Collie, who himself signed letters and accounts constituting the false representations of the fictitious cotton dealings, must be held to have been aware that he was lending himself to his brother's frauds. There was, therefore, a fraud practised on Mr. Adamson in which both the Collies were participators. And it has always been held in the Court of Chancery that for a fraud, as for a breach of trust, each participator is liable in solido. Some doubt was, however, suggested in the course of the argument whether proof could be made in bankruptcy for a fraud any more than for other torts. A great many casesif cases were necessary—show that proofs have been allowed in bankruptcy for fraud, and on the ground of fraud only, where on a mere breach of contract they would not have been admitted. A notable instance of this is in the proof allowed in Read v. Bailey (1), by the joint estate against the separate estate for moneys fraudulently abstracted from the partnership assets, a decision which only followed a whole line of recognized authorities. But, in truth, the proof is The Court of Chancery not for the fraud or for the tort. never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt. was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated. If a man had been defrauded of any money or property and the cheater afterwards became bankrupt, if the money could be earmarked, or if the thing could be found in specie, or traced, the assignees or trustees were made to give it back, or if it could not be earmarked or traced, then proof was allowed against the estate. It was a very common thing to have a suit against solvent persons and the assignees of a bankrupt, to set aside transactions as fraudulent, and to have a decree against the solvent per-

<sup>(1) 8</sup> App Cas., 94; 24 Eng. Rep., 56

<sup>(\*) 5</sup> Ch. D., 394; 22 Eng. R., 157.

sons, and a declaration of a right of proof against the estate of the bankrupt. This was done as a matter of course in the case of Phosphate Sewage Company v. Hartmont ('). 820] \*In cases of fraud, or breach of trust, which is often only one form and instance of fraud, there never was any division of liability between the tort-feasors; every person participating in the tert was liable to make good the whole; the liability of each in equity was for the whole amount. And the proof in bankruptcy was exactly commensurate with that liability; it being the established rule in bankruptcy that every debt which a person could, either in his own name or in the name of any other person, recover at law, or in equity, was a provable debt in bankruptcy. is said in the books that debts due by reason of fraud or breach of trust are joint and several. There is here a slight inaccuracy. Of course tort-feasors may be sued all in one action, or in several actions, but there is not really or practically any joint liability as distinct from the several liability, except where there is a partnership and a joint estate. It is a mere accident, but a frequent accident, that the fraud is connected with a partnership, but where it is, the result often is that the partnership in its joint character is liable for it. If the profits or proceeds of the fraud found their way into the partnership, then on that ground the partnership became indebted for them, or if the fraud was in the course of the partnership business, and was practised by one of the partners on a client or customer of the firm, then the firm—however innocent the other partners may have been, and although the guilty partner alone stole the plunder—was held liable to make full restitution to the defrauded client or customer. But this right to go against the partnership assets did not relieve the guilty party or parties of his or their personal and separate liability by reason of his or their actual participation. If in a partnership of A., B., C., and D., and in a partnership matter, A. and B. shared in a fraud upon a customer, they would be severally liable, and the joint estate would be liable to make restitution; but not the separate estates of C. and D. the rule about joint and several liability must be read with this qualification; but, so qualified, the rule is a well established rule. And, according to this rule, Mr. Adamson was not entitled to go against the joint estate and the separate estates, but had to make his election. It is not too late for him now to elect, and it must therefore be declared that he

<sup>(1) 5</sup> Ch. D., 394; 22 Eng. R., 157.

is entitled to prove against the separate estates of Alexander and William Collie in \*respect of the bills which he [821] was induced to accept by their fraud; but he must withdraw his proof from the joint estate and refund the dividend accordingly, and it must be referred back to the Registrar to ascertain the amount on the footing of this declaration. Under the circumstances, the proper order as to costs will be to allow him to add his costs in the court below and here to the amount of his proofs against the separate estates.

Bramwell, L.J.: In this case the facts and the conclusions I draw from them, so far as they need be stated, are The appellant Adamson and the bankrupts as follow: agreed to have a joint speculation in, among other things, The bankrupts were to buy and sell cotton on joint account. The cotton was to be paid for by the bankrupts, who were to draw on the appellant for the amount of the They could then procure the bills to be discounted, and, with the proceeds, pay the price of the cotton; or, of course, if their means had enabled them, they might have kept the bills and paid for the cotton out of their general funds. If, when the bills became due, the cotton was not sold, then the bankrupts were to draw fresh bills on the appellant, and, as before, or out of their general funds, provide for the former bills. The bankrupts represented to the appellant that they had bought quantities of cotton and drew bills on him for the amount of the price. These bills he accepted. They were renewed from time to time, and ultimately the last renewals were paid by the appellant. turned that the statement that cotton had been bought was false and fraudulent, that scarcely any had been. Consequently, there was no cotton out of the proceeds of which the appellant could be reimbursed, and, the bankrupts having stopped payment before the last renewed bills became due, the appellant is now the amount of them out of pocket. Further, the fraud, on the evidence before us, must be taken to be a fraud by each of the bankrupts as much as by Under these circumstances the appellant had a claim on the bankrupts which he might have presented in any one of three shapes. He might have omitted all mention of fraud, and, relying on the contract of the bankrupts, might have complained that they had not bought cotton on joint \*account and have sued them for unliquidated dam- [822] ages; or he might have put his claim as for a liquidated sum by showing the facts, with no statement of fraud, and saying that the law raised a duty in the bankrupts to pay the bills, the same as in the case of an accommodation bill, and

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that, therefore, his payment under the compulsion of being the acceptor was a payment by him for them. Had he put his case in either of these ways, he would have put it in a way which entitled him to prove against their joint estate, either for a specific ascertained debt or for unliquidated damages, and not against either separate estate. Or he might have maintained a claim against them for a tort, for the fraud they had committed, in which case one may observe that, according to Barwick v. English Joint Stock Bank ('), one partner would be liable for the fraud of the other, even if personally innocent of it. This claim he might have maintained against both jointly or either separately from the other for unliquidated damages, and, except that he is precluded by his proof, might do so now; for if he had shaped his case in this way, he would have shaped it in a way which showed that he had not a provable claim, and so the bankruptcy of those liable would be no impediment to his maintaining an action against them. These are the wavs in which he might have shaped his claim at common law before the Judicature Act, and so he may now. But, besides these three ways of shaping and enforcing his claim, it appears there is another. It seems that a court of equity, before the Judicature Act, where a definite specific sum of money was obtained by fraud by two or more persons, would decree a restitution of the sum so obtained, and make the decree against the defendants joint and several. Why, I know not. If there was no fraud the plaintiff would be sent to law. So he would if the damages were unliquidated. But where there was the combination of two things neither of which was enough, the Court of Equity would grant relief. So, of course, must the High Court So that the appellant may now maintain an action for the fraud, and recover, as I have pointed out, in accordance with the former common law practice, unliquidated damages against the defendants jointly, or according to the former equity practice, a liquidated sum against them jointly 823] and severally. \*But how does this entitle him to prove for the liquidated sum due and recoverable for a fraud. any more than he could for the unliquidated sum due and recoverable for a fraud? It is to be remembered that he has not got a judgment. If he had, the amount would be provable, whether recovered for a fraud, a slander, or any other What is the difference between the two claims both founded on fraud? One is a claim for a liquidated, the other for an unliquidated sum. But that is an immaterial

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difference, as claims for unliquidated amounts are provable now. What other difference is there? The former equity decree for the liquidated sum would be against the defendants jointly and severally. The judgment at common law would be against them jointly only. But this makes no difference; the foundation of the claim is the same, and, as I have said, no judgment has been got. And though the common law judgment is not against the defendants jointly and severally, its effect is nearly the same. If the claim for the unliquidated amount is not provable, why is that for the liquidated? The reason why the one is not provable is equally applicable to the other. And that reason is this, that the law does not allow it. Claims founded on tort are not provable; nothing is provable but those claims which The Bankruptcy Act, sect. 1, says, arise out of contract. "Debt provable in bankruptcy shall include any debt or liability by this act made provable in bankruptcy." Sect. 31 says, "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy." If that was all, it might be said that this is not a demand in the nature of unliquidated damages, and therefore not prohibited. True, it may not be thereby prohibited, but the next clause is "save as aforesaid all debts and liabilities," &c., shall be deemed to be debts provable, and "liability" is afterwards said to include a variety of matters all of which suppose an express or implied contract. There are, no doubt, provable debts where there is no contract, as a debt on a judgment. But in such cases the law implies a duty to pay it. But, certainly, till the present case, it was never supposed that a claim for a wrong was provable, or that the discharge of the bankrupt released him from such a claim. Would the discharge of these bankrupts discharge them from an action against them in the form of the old suit in equity \*for a joint and [824] several decree for payment of money? The proof against the separate estate in Read v. Bailey (1) was the proof of a debt. The proof in Phosphate Sewage Company v. Hartmont (') was ordered without the question being mooted as to whether the ground of fraud in the case prevented the The proof against the separate estate of the infant obligor of a joint and several bond was allowed, because it was a joint and several bond, and he was held to be bound Breaches of trust are provable against joint or separate estate, because, I suppose, trustees are held to undertake jointly and severally for the performance of their duties,

<sup>(&#</sup>x27;) 3 App. Cas., 94; 24 Eng. R., 56. 25 Eng. Rep. 89

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not because there is fraud in breach of trust. There may be a breach of trust where in all good sense there is no pretence for saying there is fraud. To my mind, then, the present claim is contrary to principle, contrary to the statute, and without precedent. Mr. Justice Lindley's opinion is clearly against it. On the other point, whether the appellant is too late to change his proof, I am in his favor. I will only add that I cannot see that the separate estate has any ground for complaint, except that the proof comes late, which is no objection; and that the joint estate cannot complain that it is relieved of a proof. But, on the other ground, I am of opinion that the appeal should be dismissed.

The court gave the trustee leave to appeal to the House of Lords, on condition of his presenting the appeal within a

month.

August 1. Winslow, Q.C., for the trustee, asked that, in drawing up the order, provision should be made for payment of interest by the appellant on the dividend which he was to refund.

De Gex, Q.C., for the appellant: Interest was not asked for when the appeal was heard, and it would be contrary to the practice to give it where money has been received by mistake: Ex parte Waring('); Ex parte Law('); Ex parte Lubbock('). The appellant has lost a dividend on the separate estate.

825] \*James, L.J.: The point may be a new one, but I have not the slightest hesitation or difficulty in making a precedent. The appellant comes to the court to be relieved from his own mistake, and justice requires that he should fully reimburse the joint estate. The principle of the judgment was refunding, and the money must be refunded with reasonable interest. The interest will be at the rate of 4 per cent. The order will be dated to-day. The costs of this application will be part of the costs of the appeal.

Brett and Cotton, L.JJ., concurred.

The time for appealing to the House of Lords was extended.

Solicitors for appellant: Ashurst, Morris, Crisp & Co. Solicitors for trustee: Travers Smith & Braithwaite.

(1) 3 D. M. & G., 445 n. (9) Mont. & Ch., 111. (3) 4 D. J. & S., 516.

See 24 Eng. Rep., 64 note.
A principal cannot have the benefit of transactions by his agent without adopting, and being responsible for, all the representations made by his agent therein: Crans p. Hunter, 28 N. Y.,

389; Lamore v. The Port, etc., 49

Where false statements made by one partner in regard to the solvency and pecuniary resources of his firm, for the purpose of obtaining credit on the pur-

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chase of goods for said firm, and with the intent to cheat and defraud the party from whom the goods are purchased, when sufficiently averred in a pleading or affidavit, are sufficient to sustain an action on the case for fraud and deceit against the party making such false statements (Stitt v. Leith, 63 N.Y., 427), and uncontroverted they show the debt to have been fraudulently contracted, and for the fraud thus perpetrated the partner by whom the false representations are made, if not others to be profited by the transaction, can be lawfully arrested and held to bail: Witmark v. Herman, 44 N. Y. Superior Ct. Rep, 144, citing Sherman v. Smith, 42 How. Pr., 198.

If one partner, in the partnership business, practice a fraud upon a third person, the other partners, as members of the firm, are liable civilly for such fraud: Tracy v. Veeder, 50 Barb., 70, 85 How. Pr., 209; Bauer v. Stumph, 1 Wilson's Superior Ct. R., 514; Olmsted v. Hotaling, 1 Hill, 317; Griswold v. Hauver, 25 N. Y., 595.

See also Merchants Bank v. Holland, 4 Hun, 420, 66 N. Y., 648.

And it has been held, that an order of arrest might be issued against the partner not guilty of the fraud, if the firm has had the benefit of the transaction: Tracy v. Veeder, 35 How. Prac.,

But it has since been held, that statutes authorizing arrest and imprisonment for debt, although remedial to the extent that they are designed to coerce payment, are also regarded as penal, and are not to be extended by construction so as to embrace cases not clearly within them.

The provision of the Code (sub. 4, § 179), authorizing an arrest "when the defendant has been guilty of a fraud in contracting the debt or incurring the obligation upon which the action is brought," applies only to actual personal fraud on the part of de-fendant, and does not include merely legal or constructive fraud.

In an action, therefore, against a principal to enforce a contract for the purchase of property made by his agent, the defendant cannot be arrested on proof that the vendor was induced to enter into the contract and give a credit by means of fraudulent representations of the agent, when the fraud was not known to or authorized by defendant, and was not ratified by him after information thereof: Hathaway v. Johnson, 55 N. Y., 93; National Bank v. Temple, 2 Sweeny, 344.

[8 Chancery Division, 825.]

V.C.B., June 27: C.A., July 10, 1878.

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[1877 P. 25.]

Composition—Registration of Resolutions—Protection of Debtor—Debt incurred by Fraud—Breach of Trust—Attachment—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 12, 126—Debiors Act, 1869 (32 & 33 Vict. c. 62), s. 15—Bankruptcy Rules, 1870,

The provisions for the protection of a debtor in sect. 12 of the Bankruptcy Act, 1869, and rule 289 of the Bankruptcy Rules, 1870, do not apply to composition.

After the registration of composition resolutions the composition proceedings are no longer pending.

Decision of Bacon, V.C., reversed.

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[9 Chancery Division, 1.]

FRY, J., March 23: C.A., April 3, 1878.

\*BURGOINE V. TAYLOR.

[1877 B. 321.]

Practice—Judgment in Default of Appearance at Trial—Application to set aside Judgment—Negligence of Solicitor—Rules of Court, 1875, Order XXXI, r. 20.

A defendant was not represented at the trial of an action, because his solicitor was ignorant of the fact that, in pursuance of an order of the Lord Chancellor, the action had, with others, been transferred from one judge of the Chancery Division to another, and had therefore only watched the list before the former judge:

Held, by Fry, J., that the solicitor had been guilty of gross negligence, and that the judgment which had been given for the plaintiff could not be set aside under Rules

of Court, 1875, Order xxxvi, r. 20:

Held, on appeal, that the judgment must be set aside on payment of the costs of the day.

This action was in the list for trial before Mr. Justice Fry on the 18th of March, 1877. The defendant did not appear, 2] and \*judgment was given for the plaintiff. The action had been originally set down before Vice-Chancellor Malins, and it was, by an order of the Lord Chancellor, dated the 21st of February, 1878, transferred (with other actions) to Mr. Justice Fry for trial.

On the 20th of March the defendant, by special leave of the court, gave notice of motion that the judgment might be set aside and the action restored to the paper for trial on such terms as to the court might seem fit. In support of the motion two affidavits were filed, one made by the defendant's solicitor, the other by his clerk. The solicitor said: "The order for such transfer was unknown and unnoticed by me, the duty of watching the lists of causes for trial having been intrusted to the clerk in my office, who should attend to such matters, and the order for such transfer being unobserved by the clerk, the list of causes in Vice-Chancellor Malins' court was alone watched, and this cause appears therein to stand fifty-seven below the causes for trial on the 18th inst. No steps were taken for instructing counsel to appear for the defendant; therefore this cause was tried yesterday without appearance on the part of the defendant, his solicitors having no knowledge that it stood for trial in the court of Mr. Justice Fry. The defendant has a good defence on the merits of the case, and is prepared to substantiate such defence by evidence in court." The clerk said: "The duty of watching the list of causes for trial having been intrusted to me at the commencement of January last, on one or two occasions I searched the book containing

the list of causes to be tried before Vice-Chancellor Malins kept at the Registrar's office, but, since the 12th of January last, when the said list of causes appeared in the Weekly Notes of that date, I have every day carefully watched the daily list of causes to be tried before Vice-Chancellor Malins as it appeared in the Times newspaper, and compared the same with the said list of causes as contained in the Weekly Notes, and on the 18th of March inst. this cause appears about fifty below the causes for trial on that day. The order for the transfer of this cause was entirely unknown and unnoticed by me."

The motion was heard before Mr. Justice Fry on the 23d

of March, 1878.

\*Dauney, for the defendant: The court has power to [3 grant the application under Rules of Court, 1875, Order XXXVI, rule 20, and the evidence shows sufficient ground for granting it. Wright v. Clifford, before your Lordship on the 11th of February, 1878, was a very similar case. Of course the defendant will have to pay the costs of the trial and of this motion, but that is a sufficient penalty to impose on him.

North, Q.C., and Baker, for the plaintiff: A party has a right to retain every advantage which the rules give him: International Financial Society v. City of Moscow Gas Company (1); Rhodes v. Jenkins (2). Wright v. Clifford was a different case.

[FRY, J.: There had been a sudden run on the paper.]

Cockle v. Joyce (\*) is also distinguishable.

[FRY, J.: In that case the plaintiff's leading counsel had been detained by a railway accident, and the junior counsel, though he was present in court, was so unwell that he was unable to address the court.]

Watt v. Barnett (') shows that the applicant ought to sat-

isfy the court that he has a good defence on the merits.

[FRY, J.: I always feel great hesitation in making a man swear to merits; it imposes a great burden on his

conscience.]

Danney, in reply: There will be no hardship on the plaintiff, if the application is granted; he will be in the same position as if the action had not been tried. On the other hand, if the application is not granted, the hardship to the defendant will be very great.

[FRY, J.: He will have a remedy against his solicitor for

negligence.]

(1) 7 Ch. D., 241, 247. (3) 7 Ch. D., 711. (\*) 7 Ch. D., 56. (\*) 3 Q. B. D., 363. Is the mere omission of a clerk to think of the possibility of a transfer a sufficient reason for inflicting such a penalty on the solicitor? The cases cited with regard to applications for extending the time for bringing an appeal depend 4] on a different \*principle. There the party had the rules before him, and chose to put his own construction upon them; here the solicitor and his clerk were ignorant of the fact of the transfer.

FRY, J.: I am asked to set aside this judgment on the simple ground that the defendant's solicitor and his clerk were so negligent that they did not know of the order for transfer, or that the action had come into the list for trial, and I think that I ought not, upon this simple ground of gross negligence, to grant the application. It is very important that it should be understood that solicitors are bound to use due diligence. The fact that the transfer had been made ought to have been known to the defendant's solicitor or to his clerk. The order for transfer was published in the Weekly Notes, which it is clear from the affidavits that the defendant's solicitor took in. He had ample means of knowing of the transfer. If I were to accede to the application, the result would be that a solicitor who asked to have a judgment, obtained against his client in default of appearance at the trial, set aside, would only have to show that he himself had been guilty of gross negligence. I do not think it right to encourage negligence to that extent, and on that simple ground I refuse the motion with costs.

The defendant appealed. The appeal was heard on the 3d of April.

Cookson, Q.C., and Dauney, having opened the appeal,

were stopped by the court.

North, Q.C., and Baker, for the plaintiff, relied on the same grounds as in the court below.

Cookson, in reply.

JESSEL, M.R.: We think that the order asked for by the defendant ought to be made. Solicitors cannot, any more than other men, conduct their business without sometimes making slips; and where a solicitor watches the list, and 5] happens to miss the case, in consequence of \*which it is taken in his absence, it is in accordance with justice and with the course of practice to restore the action to the paper, on the terms of the party in default paying the costs of the day, which include all costs thrown away by reason of the trial becoming abortive. As a general rule, solicitors

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in my branch of the court consent to such an order as is now asked, and that such an application should be opposed is to me a novelty. Still, as the appellant was in default, he must pay the costs of the application to the court below, but no costs of the appeal.

COTTON and THESIGER, L.JJ., concurred.

Solicitors: Parson & Lee; Tippetts, Son & Tickle.

[9 Chancery Division, 5.]C.A., April 10, 1878.

In re Michell's Trusts (').

Covenant to Settle Future Property of Wife-Marriage Settlement.

A marriage settlement which recited an agreement to settle certain specified property upon the trusts thereinafter declared, and that it had been agreed that the husband should enter into the covenant thereinafter contained for settling upon the same trusts any future property to which the wife might become entitled after the solennization of the marriage, contained a covenant by the husband that if at any time during the joint lives of the husband and wife any future portion, or real or personal estate, should "come to or devolve upon" the wife, or upon the husband in her right, and whether in possession, reversion, remainder, contingency, or expectancy, the husband would settle, or concur with the wife in settling, such future portion, real or personal estate, upon the trusts declared by the settlement concerning the settled funds. At the time of the marriage the wife was entitled under a will to a contingent reversionary interest in personal estate, which, during the coverture, became vested, but did not come into possession until after the coverture had determined by the death of the wife:

Held, that it was not within the covenant.

A petitioner applied for payment out of court of the whole of a fund, his title to one moiety of which was not disputed. The court below ordered payment to him of one moiety only:

Held, that an appeal from this order was not an appeal from the refusal of an application, and that the time for appealing did not begin to run till the order was drawn up.

This was an appeal from a decision of Vice-Chancellor Malins (\*). By a settlement dated the 18th of February, 1825, a sum of \*£2,500 £3 10s. per Cent. Bank Annu- [6] ities was settled in trust for Henry Dorset for life, and after his death, for his wife Catherine for life, and after the decease of the survivor, in trust for the children of Henry Dorset by his said wife, and if none, then for the executors, administrators, or assigns of William Michell.

William Michell, by will dated the 25th of March, 1825, devised an estate at Ashburnham to Henry Dorset and his wife during their joint lives and the life of the survivor, and after the decease of the survivor, to and among the children of Henry Dorset living at the decease of such survivor, as tenants in common; but if there should be no

<sup>(1)</sup> Reversing 28 Eng. R., 224.

<sup>(2) 6</sup> Ch. D., 618; 23 Eng. R., 224.

child of Henry Dorset living at the decease of the survivor of Henry Dorset and wife, then the testator directed the property to fall into the residue of his real and personal estate. He gave the residue of his real and personal estate to trustees upon trust to sell, to invest the proceeds, pay the income to his wife Sally Michell for life, and after her death, as to one-third of the fund, in trust for testator's brother John Henry Michell, if then living, but if not, then in trust for all the children of J. H. Michell then living, as tenants in common. By a codicil the testator explained the gift to the children of H. Dorset to mean only his children by his said wife Catherine.

William Michell died on the 4th of April, 1830, and Catherine Dorset died on the 22d of May, 1840, without issue, so that on her decease the reversion expectant on the life estate of H. Dorset in the £2,500 stock and the Ashburnham estate became part of the residuary estate of W.

Michell.

J. H. Michell had one child only, Margaret Henrietta. By a settlement dated the 2d of July, 1842, made on her marriage with F. J. S. Hepburn, reciting an agreement for the settlement of certain specified funds upon the trusts thereinafter declared, and an agreement "that the said F. J. S. Hepburn should anter into the covenant for settling upon the same trusts and future property to which the said M. H. Michell may become entitled after the solemnization of the said intended marriage hereinafter contained," certain funds were settled in trust for the wife for life, then for the husband for life, then upon trusts for the children of the marriage, and in default of children, as to one moiety upon trust for the persons who at the death of Mrs. Hep-7 burn would have become \*entitled thereto as her next of kin if she had died possessed thereof intestate and without having been married, and as to the other moiety thereof, upon such trusts as Mrs. Hepburn should by will appoint, and in default of appointment, upon the trusts therein men-And by the settlement Mr. Hepburn covenanted with the trustees "that in case at any time during the joint lives of the said F. J. S. Hepburn and M. H. Michell any future portion, or real or personal estate whatsoever, exceeding at one time in value £300, shall come to or devolve upon the said Margaret H. Michell, or upon the said F. J. S. Hepburn in her right, by or under the will of the said J. H. Michell, or by or under any other will, donation, or settlement, or by any person dying intestate, or otherwise howsoever, and whether in possession, reversion, remainder,

contingency, or expectancy, the said F. J. S. Hepburn, and all other necessary parties, will from time to time effectually settle or concur with the said Margaret H. Michell in all reasonable acts and deeds effectually to settle all such future portion, real or personal estate, upon the same trusts, and with and subject to the same powers and provisions as are hereinbefore declared and contained concerning the said trust moneys and securities hereby settled, or as near thereto as by the deaths of parties and other contingencies shall be then subsisting and capable of taking effect, and as if the same future property were included and settled in and by this indenture, and being real estate were directed to be converted into personal estate."

Mrs. Hepburn, by will dated the 10th of April, 1843, appointed that if she died in the lifetime of her husband, and no child became entitled under the trusts of her settlement, then after the decease of the survivor of her father and mother one moiety of the settled funds, including funds brought in under the covenant for settlement of future prop-

erty, should belong to her husband absolutely.

J. H. Michell died on the 10th of March, 1844, and his wife

on the 21st of September, 1849.

Sally Michell, the widow of William Michell, died on the 15th of July, 1858, and Mrs. Hepburn thereupon became absolutely entitled to one-third of the £2,500 stock, and the proceeds of sale of the Ashburnham property, subject to the life interest of Henry Dorset.

\*Mrs. Hepburn died without issue on the 29th of May, [8 1859. Mr. Hepburn died on the 28th of March, 1863. Henry

Dorset died on the 5th of December, 1875.

After the death of H. Dorset, the trustees of W. Michell's will obtained a transfer of the £2,500 stock and sold the Ashburnham estate, and paid into court under the Trustee Relief Act the sum of £2,402 7s. 4d., being Mrs. Hepburn's share of the proceeds of the sale of the stock and of the Ashburnham estate.

Mr. Hepburn's executor petitioned for payment of the whole fund to him, on the ground that it was not bound by the settlement, and vested in Mr. Hepburn as having survived his wife and become her legal personal representative. Vice-Chancellor Malins, however, under the impression that this fund was at the death of W. Michell part of his residuary estate, held that it had devolved upon Mrs. Hepburn during the coverture, and was bound by the settlement, and that therefore one-half only belonged to her husband's representative, and the other half of it to her next of kin.

25 Eng. Rep.

The executor of the husband appealed, the appeal being brought within twenty-one days from the time of the order being entered, but not within twenty-one days from its being pronounced. The appeal was heard on the 10th of April, 1878.

This is an interlocu-Whitehorne, for the respondents: tory order: In re Baillie's Trusts (1). The petitioner asked for the whole fund. We never disputed his title to half. and the order gives him half. The case, therefore, is simply one of refusal of his application for more, and the appeal ought to have been brought within twenty-one days from the time of the order being pronounced: Swindell v. Birmingham Syndicate (\*); Trail v. Jackson (\*); Berdan v. Birmingham Small Arms and Metal Company (1).

THE COURT (Jessel, M.R., and James and Cotton, L.JJ.) held that the appeal was not from the refusal of an order, but from an order with which the appellant was dissatisfied,

and was therefore in time.

\*Glasse, Q.C., and W. King, for the appellant: No part of the fund came into possession during the coverture, and the mere change of a future interest from contingent to vested is not enough to satisfy the words of the covenant: In re Pedder's Settlement Trusts (\*); In re Clinton's Trust(\*); In re Viant's Settlement Trusts('); In re Jones' The Vice-Chancellor went on Archer v. Kelly (\*), which has no bearing on a covenant worded like this.

J. Pearson, Q.C., and Whitehorne, contrà: The interest was contingent at the time of the marriage, and during the coverture it became vested. A fresh title therefore accrued, which is enough to satisfy the words, the interest having altered its character: Cornmell v. Keith (10); Archer v.

Kelly; In re Browne's Will (").

JESSEL, M.R.: It does not appear to me that any of the authorities cited here and in the court below govern this The question for the court to decide is a question as to the construction of the settlement. The settlement, though obviously drawn by a lawyer—probably by a conveyancer—contains a covenant which appears to have been inserted without sufficient consideration as to its wording, and no doubt it presents very great difficulties as regards its

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(1) 4 Ch. D., 785; 21 Eng. R., 700.
                                                 (1) Law Rep., 18 Eq., 436; 10 Eng. R.,
                                               755.
(2) 8 Ch. D., 127.
(8) 4 Ch. D., 7.
(4) 7 Ch. D., 24.
                                                 (8) 2 Ch. D., 362; 16 Eng. R., 791.
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(6) Law Rep., 13 Eq., 295; 1 Eng. R., (11) Law Rep., 7 Eq., 231.

<sup>(9) 1</sup> Dr. & Sm., 800. (10) 3 Ch. D., 767; 18 Eng. R., 810. (b) Law Rep., 10 Eq., 585.

construction. One thing, at all events, is plain, that it applies to future acquired property of the wife. Another thing which I think we may consider settled by authority is, that where the words of a covenant are ambiguous and difficult to deal with, we may resort to the recitals to see

whether they throw any light on its meaning.

Now it was admitted on both sides, and could not be fairly contested, that this is a covenant in itself very difficult to deal with or to construe, and therefore I will look at the recital, which is, \*that it had been agreed that "the [10 said Francis John Swaine Hepburn should enter into the covenant for settling upon the same trusts any future property to which the said Margaret Henrietta Michell may become entitled after the solemnization of the said intended marriage hereinafter contained." It therefore is clear upon the recital that the covenant was to be a covenant by the husband for settling the property, and that the property to which it related was property to be acquired in future. Tried by these tests, this property does not fulfil that de-The interest of the wife certainly became absoscription. lute instead of being contingent, but it remained in remainder or reversion during the whole period. In fact what had happened was this, that both contingencies which affected the title of the wife determined during the coverture, but there still remained a life interest, which did not determine until many years after the wife's death. [His Lordship then, after reading the covenant, continued:]

Now it is quite impossible to read that literally. The husband could not effectually settle, either by himself or with his wife, property in expectancy, that is, property which they had not got. Some words or other must be supplied, so as to make the covenant mean that the husband and wife will settle the property if, during the coverture, it so comes to them that they can effectually settle it. That agrees with the recital, and agrees with what one would expect the covenant to express, that when the husband would otherwise obtain the property he shall not keep it, but shall

settle it upon the trusts of the settlement.

Taking the covenant in that sense, it does not apply to this property, which he was not able to settle at all at any time during the coverture. He could not dispose of it by any means, nor could he or his wife together do so. It was not disposable. It was not property that could be effectually settled, and, looking at the terms of the covenant and of the recital, it appears to me that it was not comprised

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within this settlement, and therefore that the appellant ought to succeed.

JAMES, L.J.: I am of the same opinion. It appears to me that this property does not come within the words of the covenant, that is to say, \*this is not property which came to or devolved upon the wife during the coverture. the time of the coverture she had an interest, and she never during the coverture acquired an interest in possession. agree with the Master of the Rolls that the object of covenants of this kind is to exclude the husband's right, so as to make him bring into settlement that which he would otherwise take as his own property, and deal with as he liked, subject to the wife's equity of settlement; and I am of opinion it was never intended by such a covenant as this to bind the wife in case of her surviving. If the wife had survived the husband, then you could not in any way have compelled the wife to have brought this fund into settlement for the purposes of that settlement, and exclude herself from dealing with it afterwards in any way she thought fit. If the wife was not bound by it, then the legal personal representative of the wife is not bound by it, although that legal

personal representative happens to be the husband.

COTTON, L.J.: The real question which we have to decide is whether this property comes within this covenant on its fair construction, in which, of course, I take this into account, that if on any previous occasions the court has laid down a rule applicable to this case, we must follow it, and con-strue the covenant with regard to any rule which the court has laid down. But, in fact, it is conceded that there is no case applicable to the present, except that Archer v. Kelly (1), where the covenant was something like the one now before us, was relied upon, and it was contended that the court there laid down the rule that property would be brought within such a covenant if a change in the nature of the wife's interest in it took place during the coverture. But I do not think that the court laid down any such rule. What the court said in Archer v. Kelly was this, that where the covenant is for the settlement of property to which the wife shall become entitled during the coverture, without say ing more, then if property to which she was at the time of the marriage entitled in reversion falls into possession during the coverture, she thereby becomes entitled within the mean-12] ing of \*the covenant. That is reasonable enough, for as it falls into possession during the coverture, the husband, apart from the covenant, takes it absolutely, and the object of these covenants is to prevent him from taking absolutely,

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and to bind for the benefit of the wife and of the children what he would otherwise take absolutely. That does not apply to such a case as this, where the wife was contingently entitled to the property at the time of the marriage, and never during the coverture acquired an interest in possession.

Now, does it come within the words of the covenant? covenant does not speak of property which "shall become vested," or anything of that kind, but only of property which shall come to or devolve upon the wife or upon the husband in her right during their joint lives. Can it be said that this property in any way came to the wife, or devolved upon the wife or the husband in her right during their joint lives? In my opinion it is impossible to say so. fore of opinion that it was not bound by the covenant.

Solicitors: Dunster; Bridges, Sawtell & Co.

[9 Chancery Division, 12.]

V.C.H., Nov. 27, 1877. C.A., May 8, 1878.

In re NEWMARCH.

NEWMARCH V. STORR.

[1876 N. 45.]

Administration—Will—Mortgage Debt—17 & 18 Vict. c. 113 (Locke King's Act)—30 & 31 Vict. c. 69—Charge of Debts on other Real Estate.

A charge of debts on part of testator's real estates in exoneration of the rest without specially referring to his mortgage debts, is not a sufficient expression of an intention contrary to the rule established by Locke King's Act to exonerate the mortgaged estate.

Locke King's Act applies to a mortgaged estate, different portions of which are devised to different persons; and the devisees must contribute according to the value

of their respective portions.

A testator, nearly the whole of whose real estate was subject to a mortgage debt, devised a part of his real estate to his sons, "charged nevertheless in aid of his personal estate and in exoneration of his other real estate with the \*payment of [13] all his just debts," and he devised another part of his real estate to his daughter:

Held (reversing the decision of Hall, V.C.), that there was no sufficient declaration

of a contrary intention under Locke King's Act, and that both the devisees must con-

tribute ratably to payment of the mortgage debt.

F. B. NEWMARCH, by his will, dated the 15th of October, 1875, after appointing the defendants, C. Storr and J. Shaw, his executors and trustees, and giving various specific and pecuniary legacies, devised the close of land which he had purchased of Messrs. Collinson at North Cave, called Bean Butts, which was then in the testator's occupation, and the seven cottages at North Cave, which he had purchased of Miss Hewson, to his trustees in trust for his wife for life, and after her death in trust to sell the same and divide the

proceeds among his children as therein mentioned. tator then devised a house, garden, and orchard, situate at North Cave aforesaid, which he described as then in the occupation of Robert Dunning, and certain other hereditaments in the occupation of his son-in-law, E. Nickless, to his daughter Elizabeth, the wife of E. Nickless, during her life, and after her death to her children. And the testator then proceeded as follows: "And I devise the mill, messuage, lands, and other hereditaments now in my own occupation, and also all other my real estate whatsoever and wheresoever not hereinbefore otherwise disposed of (except estates vested in me as mortgagee or trustee), charged nevertheless in aid of my personal estate and in exoneration of my other real estate with the payment of my just debts and testamentary expenses, and I bequeath the residue of my personal estate not hereinbefore otherwise disposed of to the said C. Storr and J. Shaw in trust to convert the same into money by sale or otherwise, and after paying such debts and the pecuniary legacies hereinbefore bequeathed, in trust to divide the net residue equally among my three sons, Ingram Newmarch, Henry Newmarch, and Edwin Newmarch."

The testator died in November, 1875. His personal estate was sworn under £2,000. His debts consisted of a mortgage debt of £1,000, and simple contract debts to the amount of about £300.

The present action was brought by the testator's three sons against the executors for the administration of the estate. Several difficulties arose on the interpretation of the 14] will, but the only \*question which it is necessary to report was as follows: At the date of the testator's death and of his will all his real property, except the cottages purchased of Miss Hewson, were subject to a mortgage for £1,000 effected in 1871, and the question now arose whether the mortgage debt was to be borne ratably by all the devisees of the property subject to it, or exclusively by the plaintiffs under the special direction contained in the residuary devise.

The action came on for further consideration and upon summons to vary the Chief Clerk's certificate, before Vice-

Chancellor Hall, on the 27th of November, 1877.

W. Pearson, Q.C., and Macnaghten, for the plaintiffs, contended that Locke King's Act (17 & 18 Vict. c. 113) applied notwithstanding the special direction contained in the will. They referred to Sackville v. Smyth (1).

<sup>(1)</sup> Law Rep., 17 Eq., 153; 7 Eng. R., 734.

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Dickinson, Q.C., and Williamson, for Elizabeth Nickless, were not called on.

W. Barber, for the trustees.

HALL, V.C.: If I acceded to the argument of Mr. Pearson, I should, I think, be doing violence to the express declaration of intention of the testator. The testator has said that the property comprised in the disposition is to be charged in aid of his personal estate and in exoneration of his other real estate with the payment of his just debts and testamentary expenses. I must give effect to the testator's direction.

From this decision the plaintiffs appealed. The appeal was heard on the 8th of May, 1878.

Macnaghten (W. Pearson, Q.C., with him), for the appellants: The words "just debts" do not include this mortgage Therefore the direction contained in the will is not a sufficient declaration of intention to take the case out of Locke King's Act. It might have been sufficient before the passing of the Amendment \*Act, 1867 (30 & 31 Vict. c. 69), [15] under the authority of *Eno* v. *Tatham* (') and *Moore* v. *Moore* ('); but the 1st section of the act of 1867 (') overruled that interpretation of Locke King's Act, and enacted that a simple charge of debts on personal estate should not be deemed a sufficient declaration of intention to exonerate the mortgaged estate; and although a similar charge of debts on other real estate is not mentioned in the act, yet the principle is the same in both cases. The decisions in the Court of Chancery were based upon the assumption that "debts" or "just debts" included mortgage debts. The principle of the act of 1869 was, that, in considering whether a declaration in a will was sufficient to take the case out of the operation of Locke King's Act, the words "debts" or "just debts" were not to be held to include mortgage debts: Sackville v. Smyth ('); Nelson v. Page ('). The construction contended for by the respondents makes the words "in aid of my personal estate" surplusage. For those words could

the rule established by the said act, unless such contrary or other intention shall be further declared by words expressly, or by necessary implication, referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate."

<sup>(1) 3</sup> D. J. & S., 443.

<sup>(3) 1</sup> D. J. & S., 602.

<sup>(3) 30 &</sup>amp; 31 Vict. c. 69, s. 1: "In the construction of the will of any person who may die after the thirty-first day of December, one thousand eight hundred and sixty-seven, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to or other than

<sup>(4)</sup> Law Rep., 17 Eq., 153; 7 Eng. R., 734.

<sup>(5)</sup> Law Rep., 7 Eq., 25.

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C.A.

not create a charge of the mortgage debt on the personal estate, that being contrary to the act of 1867. The words would therefore have no effect at all.

BAGGALLAY, L.J.: Might not the testator mean to charge such of his just debts as were payable out of the personal estate on the devised estate in aid of the personal estate, and such of his debts, namely, the mortgage, as were not payable out of the personal estate, on the devised estate in ex-

oneration of the other real estates?

Dickinson, Q.C., and Williamson, for Elizabeth Nickless: Locke King's Act has no application to a case of contribu16] tion \*between devisees of different portions of an estate the whole of which is subject to one mortgage. The act of 1867 has no application to this case. It only refers to a charge of debts on the personal estate. It would be extending the operation of the act in an unwarrantable manner to make it include a charge on other parts of the feal estate. But even if the act of 1867 applies to the case, there is a sufficient expression of an intention to include the mortgage debt to satisfy the act. The words "in exoneration of my other real estate" must have reference to the mortgage debt, or they have no meaning.

gage debt, or they have no meaning.

JESSEL, M.R.: Two questions are raised by this appeal of considerable difficulty, one as regards the construction of Locke King's Act, and the other as regards the interpreta-

tion of the testator's will.

The first question, namely, that which relates to the act, is the most material. The act is not an easy one to construe, and the point now before us gives rise to considerations which do not appear to have been discussed much, if at all, in previous cases. In the first place, does the act apply at all where there is a question of contribution between devisees of different portions of an estate subject to one mortgage debt? Secondly, if this question is answered, as I think it must be, in the affirmative, what is a sufficient declaration of contrary intention by the testator? And, thirdly, is there a sufficient declaration of contrary intention in this will to satisfy the act?

On the first question I think it is clear that the act must apply, because it says so in express terms. The act provides (sect. 1) that where a testator shall die seised or possessed of land or hereditaments charged with any sum of money by way of mortgage, "and such person shall not by his will or deed or other document have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not

be entitled to have the mortgage debt discharged or satisfied. out of the personal estate, or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which \*the same shall be [17] charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof." In this clause I understand the words "or any other real estate of such person" to mean "other real estate not descended or devised to such heir or devisee," not "other real estate not comprised in the mortgage." Therefore there is an express enactment that unless the testator has signified a contrary or other intention, the different parts of the charged estate shall in the hands of the devisees bear proportionate parts of the mortgage debt according to their value. In this will we have different portions of the mortgaged property given to different devisees, and therefore, according to the express words of the act, they must bear their ratable proportion of the mortgage debt unless a contrary intention is signified.

Then comes the second question, What is a contrary intention? Suppose the testator directed that all his just debts should be paid out of his personal estate. gage debt is, of course, a just debt. Would, therefore, that general direction be a sufficient indication of a contrary intention? It was decided in Moore v. Moore (') that it would be sufficient. A similar conclusion was arrived at in Eno v. There the testator gave all his personal estate Tatham (\*). to his executors "subject to the payment of his just debts," and it was held that this had the same effect as a direction to pay his just debts out of his trust estate, and was sufficient to take the case out of the operation of the act. another act was passed in 1867 to explain Locke King's Act. It was a construing and explaining act; it did not profess to amend the former act, but to set aside the interpretation that had been put upon it; it was, in fact, a polite way of overruling the decisions of the Court of Chancery. That act provided that, in the construction of future wills, "a general direction that the debts, or that all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all

<sup>(1) 1</sup> D. J. & S., 602. 25 Eng. Rep.

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or some of the testator's debts or debt charged by way of mortgage on any part of \*his real estate." It is true that the act only refers to a direction to pay debts out of personal estate, but the reason for that was that there had been a decision of the court on that point. But is it possible consistently to hold that a direction to pay debts out of the personal estate does not evince a contrary intention to the rule established by Locke King's Act, and that a direction to pay them out of real estate, or out of a mixed estate of realty or personalty, does evince such a contrary inten-tion? I think not. The ground of the decisions of the Court of Chancery was that "just debts" was a known term, and that it included mortgage debts. That ground must be considered to have been done away with by the act of 1867, because that act said in effect that the word "debts" was not to include mortgage debts unless there were express words showing an intention that it should do This enactment must be considered as imported into the original act. It is impossible not to hold that the same words that are insufficient to charge the testator's personal estate are insufficient also to charge his other real estate. therefore take it to be clear that a charge of debts on personalty or on realty does not now sufficiently indicate an intention to exonerate the mortgaged estate.

The remaining question is, whether this applies to the The mortgage debt is not mentioned at all. will before us. [His Lordship read the clause in the will set forth above.] As I read the clause, I am of opinion that the words "my just debts" in this will do not include the mortgage debt, unless there is something in the context to show that it was intended to be included. Is there anything to this effect in the context? The only words that are relied on are the words "in aid of my personal estate and in exoneration of my other real estate," and the whole argument has turned on these words. It was said that, on the construction of the appellants, the words "in exoneration of my other real estate" could have no meaning given to them, because you do not exonerate them at all unless you exonerate them from the mortgage debt. But the same difficulty would arise with respect to the words "in aid of my personal estate" on the other construction. The one set of words are reduced to a surplusage by one construction, and the other set of words by the other construction. \*So one difficulty can be set off against the other. I think the true construction of the clause is, that the real estate is to be ex-

onerated only to the same extent as the personal estate is aided; and by virtue of Locke King's Act the personalty is not liable to the payment of the mortgage debt. Otherwise, the logical result would be that the effect of the clause would be to charge the personal estate, a result which would be contrary to the express words of the act of 1867. For these reasons, I think that the decision of the Vice-Chancellor on this point must be reversed.

BAGGALLAY, L.J.: I confess that I have had serious doubts on this question, and those doubts have not been entirely removed by the arguments of counsel or by the judgment of the Master of the Rolls. But as Lord Justice Bramwell agrees with the Master of the Rolls, my doubts are not important to the decision of the court, and as they do not extend beyond doubts, I will content myself with merely stating them. Locke King's Act laid down two rules for the guidance of executors in the administration of estates where there was a mortgage debt. One was negative, that it was not to be paid primarily out of the personal estate; the other positive, that it was to be paid primarily out of the real estate charged. These rules must be kept The question on this appeal is not whether the debt should be paid out of the personal estate or out of the other real estate not charged with the mortgage, but whether it should be paid out of one particular portion of the property charged with the mortgage.

The act of 1867 dealt only with the question whether the mortgage debt should be paid out of the personal estate. is confined to that negative rule. But the substantial question here is, whether a contrary intention has been expressed that the portions of the property subject to the mortgage should not be charged in proportion to their value. cur with the Master of the Rolls as to the extended construction of the act of 1867—that it must not be confined to a direction to pay debts out of personal estate. But I have considerable difficulty as to the effect of the words of this particular will. I suggested in the course of the \*argument a doubt whether they might not mean that as to those debts which were properly payable out of personalty there should be a charge on the devised estate in aid of the personalty, and that as to those which were payable out of the realty there should be a charge on the devised estate in exoneration of the other parts of the mortgaged estate. I still feel that doubt, but I willingly bow to the opinion of my learned colleagues.

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BRAMWELL, L.J.: I have nothing to add to the observations of the Master of the Rolls. I concur with him both in his conclusions and his reasons.

Solicitors for appellants: Monckton, Long & Co., agents for F. H. Anderson, York.

Solicitors for respondents: Lambert, Petch & Shakspear, agents for Burland & Son, South Cave; Williamson, Hill & Co., agents for England & Son, Goole.

See 28 Eng. Rep., 788 note.

Lands subject to mortgage were devised "after payment of debts" to the widow for life, remainder to the plaintiff, who accepted from the widow a lease for her life on the premises. The widow having refused to pay the interest accruing on the mortgage, the plaintiff paid the same and also the principal money thereon:

Held, that these facts did not entitle the plaintiff to call upon the widow for payment out of the rents reserved by the lease, or out of the personal estate bequeathed to her; the only relief to which he was entitled being to have the mortgage debt, together with the interest on the sum secured until it became due, raised out of the land: Burk v. Burk, 26 Grant's Chy., 195.

A tenant for life is bound to keep the premises in repair; and the court will not apply the undisposed of person-

alty in effecting such repairs. The fact that the tenant for life (the widow) has not the means of making the repairs, and that the premises are deteriorating in consequence of non-repair, are proper matters for trustees with power of sale to take into consideration in determining whether or not they will sell. The testator directed all his just debts, etc., to be paid; and devised and bequeathed to his wife for life, his real estate and his "household furniture, plate, linen and china." After her decease, he gave the proceeds of the sale of the land, and also all and singular the residue of his personal estate that might be in her possession at the time of her decease, to other parties. Held, that there was an intestacy as to all the personalty, not specifically bequeathed to the wife: Holmes v. Wolfe, 26 Grant's Chy., 228.

[9 Chancery Division, 20.]

M.R., Feb. 8: C.A., May 11, 13, 1878.

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[1875 D. 27a.]

Practice—Special Referee—Reference as to Damages—Power of Court to review Report of Referee—Judicature Act, 1873, ss. 56, 57; Rules of Court, 1875, Order XXXVI, r. 34.

When a judge has referred the amount of damages in an action to a special referee, he may accept it wholly or partially, or, if dissatisfied with it, he may wholly disregard it, or remit to the referee for amendment, but he has no power to alter or vary it.

The Master of the Rolls referred the amount of damages to a special referee, and on the report being made, being dissatisfied with the principle on which the referee had proceeded, assessed the damages himself, using for the purpose the shorthand notes of the evidence heard before the referee. The Court of Appeal reversed his decision, and remitted the case to the referee to rehear the matter, with liberty to report specially on any facts.

Whether a referee ought to state his reasons, quære.

The action in this case was brought by the Dunkirk Colliery Company, the lessees of a coal mine in the county of Chester, against Ellis Lever, carrying on business under the firm of Ellis \*Lever & Co., to enforce performance of [21] an agreement dated the 28th of April, 1875, to sell to him 15,000 tons of cannel coal, to be delivered at the pit siding at the rate of 300 tons per week, at the price of 26s. per ton, payable by monthly payments. The plaintiffs stated that the defendant had refused to perform the agreement; that the price of cannel coal had fallen considerably; and that they had incurred great damage by the breach of the agreement. The plaintiffs afterwards made a fresh contract with the Manchester Corporation, and claimed as damages the difference between 26s. a ton and the price which they had obtained under the contract with the Manchester Corporation.

At the trial of the action before the Master of the Rolls, on the 19th of December, 1876, his Lordship held the plaintiffs entitled to relief, and ordered that the defendant should pay the plaintiffs their costs of the action, and that it should be referred to Mr. W. R. Kennedy, as special referee, to inquire and report to the court what damages had been sustained by the plaintiffs by reason of the non-performance of the agreement, and that after he had made his report such further order should be made by the judge in chambers with respect thereto and to the subsequent costs as should be just.

Mr. Kennedy made his report, dated the 23d of July, 1877, and thereby certified that he found that the damages in the action for the non-performance of the agreement were £2,967 10s., being the difference between the contract price and the prices which the plaintiffs might, acting reasonably and under all the circumstances of the case, have obtained in the market for the various deliveries of the contract quantity of cannel at their due dates during the period over which, according to the terms of the agreement, the

deliveries were to extend.

On the 8th of February, 1878, the plaintiffs moved before the Master of the Rolls that the report of the special referee might be altered or varied, or remitted for amendment to the referee, with directions that the damages should be assessed upon the principle that the true measure was the difference between the market price of the cannel and the price for which the plaintiffs sold the cannel to the Manchester Corporation, and not on the principle stated on the face of the said report, upon the ground that there was no market \*for cannel, and that the sale to the Manchester Cor- [22]

poration was a reasonable and proper course to pursue under the circumstances. The Master of the Rolls, acting on his view of the evidence which was adduced before the referee, made an order that the defendant should pay to the plaintiffs £5,300 for damages in the action, instead of £2,967 10s. found by the report.

The defendant appealed from this order.

Marten, Q.C., Gully, Q.C., and North, Q.C., for the appellant: The Master of the Rolls had no jurisdiction to make an order to vary the report of a referee, any more than a judge can vary the amount of damages found by a jury. If he was dissatisfied with it, he should have sent the matter back to the referee for reconsideration. The evidence on which the Master of the Rolls based his opinion was not properly before him; he had only the shorthand notes of the evidence taken before the referee. The practice is regulated by the Judicature Act, 1873, ss. 56, 57, and Rules of Court, 1875, Order xxxvi, rule 34.

Chitty, Q.C., Jordan, and Phipson Beale, for the plaintiffs: The Master of the Rolls had sufficient evidence before him on which to proceed. The referee proceeded on a wrong principle in assessing the damages, and as the principle and the facts on which he proceeded were stated on the face of the award, the Master of the Rolls was right in correcting it, instead of putting the parties to the expense and delay of another reference. There was no evidence of there being any market for cannel coal at the time when the contract was broken. The sale to the Manchester Corporation was the first reasonable sale which they were able to effect, and the difference between that price and the contract price is the true measure of damage: Hinde v. Liddell (').

James, L.J.: I am of opinion that the order of the Master of the Rolls cannot be sustained, upon the ground that it appears to me that there was no jurisdiction to make the order which he has made. He had made a reference to a 23] special referee, to inquire and report \*to the court what damages had been sustained by the plaintiffs by reason of the non-performance of the terms of the agreement of the 28th of April, 1875, on the part of the defendant. It really was a reference to inquire and report what damages had been sustained, which would be just the same as if there had been, under the old practice, a writ of inquiry in an action at common law where the defendant admitted the breach and there was nothing to ascertain but damages. That is really what the report was to be. The special referee re-

<sup>(1)</sup> Law Rep., 10 Q. B., 265; 12 Eng. Rep., 296.

ported the damages at a particular sum, and stated the principle upon which he had ascertained that amount of damages; and upon the principle as stated it appears to me there really is no doubt whatever that the referee was right, if the facts had warranted him in applying that principle. As at present advised, I am of opinion that the facts did not warrant the application of the principle, because in stating the principle the referee has assumed as a fact that there was what may be called a market for the sale of the goods which the plaintiffs had undertaken to sell and the defendant had undertaken to buy from the plaintiffs. I cannot find in all the evidence taken before the referee, which has been read to us by consent from the shorthand notes, that there was any such market, and therefore I think that he, on that evidence, was not warranted in saying he could apply the principle which he has applied. Thereupon there was a motion made to the Master of the Rolls to alter or vary that report. I am of opinion that the court has no jurisdiction to alter or vary the report of the referee, any more than it has power, except by arrangement at the trial, to alter or vary the verdict of a jury finding the amount of damages. The judge had power to adopt, wholly or partially, the report; but he has not adopted it either wholly or partially, but has entirely disregarded it, and has taken upon himself to assess the damages, not upon the report, either wholly or partially, but upon the shorthand writer's notes of what had taken place before the special referee. am of opinion that that could not be done. The judge, in my opinion, could not decide the amount of damages merely upon evidence taken in that way and for that purpose on the inquiry, any more than the court in banc at Westminster in any of the common law courts could have dissented from the damages found by a jury, and have taken all the \*evidence which was laid before a jury, and have said that upon that evidence they should assess the damages very differently. The motion that was made before the Master of the Rolls was that the report should be altered or varied or remitted for amendment to the referee. Agreeing, as we do, with the Master of the Rolls, that the referee had not got the facts before him to warrant the application of the principle, the latter part of the motion would seem to be a right application to have made to the Master of the Rolls; and then it ought to have gone back to the referee or been put in another mode of trial to assess the damages according to the real facts of the case and the application of the right principle to those facts. I cannot see where or how

the evidence on which the Master of the Rolls acted was referred to. The order of the Master of the Rolls does not refer to any evidence as having been before him, or as having had any evidence taken before him on which he had a right to alter the report without the consent of the parties, or upon which he could come to any conclusion as to the amount of damages. Therefore that is fatal, as it seems to me, in point of form. We have no facts before us from which we can either differ from or agree with the Master of the Rolls upon the amount of damages he has assessed in-

stead of that which the referee has assessed.

What is the principle on which the court ought to refer it back to the referee? I do not think the plaintiffs were entitled to have it referred back on the principle that the true measure was the difference between the contract price and the price for which the plaintiff sold the cannel to the Manchester Corporation, for in fact we have it in evidence that they never did sell the particular 15,000 tons which were the subject of the contract with the defendant to the Manchester Corporation. What the defendant agreed to take was 300 tons a week for so many weeks, and what was sold to the Manchester Corporation was a similar thing; but it was under a new contract for a different period, beginning at some day after this contract. In that case the facts would not warrant the application of the principle, because these particular 15,000 tons never were sold to the Manchester Corporation any more than to anybody else. Under those circumstances the only thing that we can do is to send it back to the referee with an intimation that we are 25] of \*opinion upon the facts (agreeing with the Master of the Rolls in that respect), that the facts do not warrant the application of the principle mentioned in the award, namely, that there was what may be properly called a market. What I understand by a market in such a case as this is, that when the defendant refused to take the 300 tons the first week or the first month, the plaintiffs might have sent it in wagons somewhere else, where they could sell it, just as they sell corn on the Exchange, or cotton at Liverpool: that is to say, that there was a fair market where they could have found a purchaser either by themselves or through some agent at some particular place. That is my notion of the meaning of a market under those circumstances. There being no market, then, it seems to me impossible to lay down a general principle upon which the referee is to assess the damages, but what the plaintiffs are entitled to is the full amount of the damage which they have really sus-

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tained by a breach of the contract; the person who has broken the contract not being exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business. And it appears to me, assuming the plaintiffs to have acted like reasonable men of business under all the circumstances of the case, the damage they have sustained would be exactly the same as if, instead of its being a wilful refusal on the part of the defendant to take the coal, the defendant had become bankrupt or insolvent, or had died or been prevented in some way from fulfilling their contract, and there had been nobody from whom the plaintiffs could have recovered the damages. think it must go back to Mr. Kennedy to review his report. He must rehear the case and report upon it, and I think it is right that there should be liberty for him to report any facts which he considers proved in addition to the principle upon which he proceeds. When that is done the matter may be disposed of, as I think, without further difficulty.

BAGGALLAY, L.J.: It appears to me that there has been a miscarriage in this case that can best be remedied by referring the matter back to the \*referee in the manner proposed by the Lord Justice. It was quite open to the Master of the Rolls, if he had thought fit so to do, to have made in substance the order he has made, namely, for the payment by the defendant to the plaintiffs of £5,300 for damages in the action, and of the costs of the action upon the original hearing, provided there had been before him the proper evidence to have made a foundation for such an order; but instead of adopting that course, the Master of the Rolls in the exercise of his discretion sent the matter to a special referee to assess the damages which the plaintiffs had incurred. When the matter came back again before him, having made that reference under the 56th section of the Judicature Act, it was quite open to him to adopt the report which the referee made, either wholly or in part; but the view that I take of the case is that it was not open to him to amend or vary the report made by the referee in the same way as he might a certificate from his own chambers. He had power to adopt it, wholly or in part, but not to amend or vary it. If he thought that the referee had proceeded upon any wrong principle in assessing the damages, or had formed any wrong opinion upon the facts brought under his consideration, the proper course then was for him to remit the matter to the referee for further investigation;

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but at the same time it was open to him to utterly and entirely disregard what had been done by the referee, and then his duty was to have proceeded and determined the action upon the evidence that might be properly before him.

Now, the order which is now brought under appeal before us is quite silent as to any evidence having been before the Master of the Rolls at all. We are told, and probably correctly, that the shorthand notes of the evidence which was before the referee were used by both sides, more or less, in the course of the argument which was addressed to the Master of the Rolls, and we have it also stated that an application was made—for it was understood that the proceeding before the court was to be considered as an application for the final judgment of the court—for an opportunity of adducing further evidence to meet matters which had been raised in the investigation before the referee. That application was not entertained by the court. We are, therefore, dealing with an order which, upon the face of it, purports 27] to vary the report \*which the referee has made: because it says the judgment is to be for £5,300 damages in lieu of £2,967 10s. which is found in the report; and, for the reasons which I have mentioned, it was not within the jurisdiction of the Master of the Rolls to make such an order. I am bound to say, after listening with the best attention I could to the portions of the evidence which were read to us on this appeal, and after having cast my eye over the copy of the shorthand notes, that it seems to me that there has been a great deal of evidence which requires more explanation. I think the suggestion that the referee in his report should draw attention to the nature of the evidence before him, and to the facts before him bearing upon the more important part of the case, is a very good and valuable suggestion; so that when the report comes back again, or rather when a new report is made, it will be in a state in which it can be dealt with by the court.

BRAMWELL, L.J.: I am entirely of opinion that the order of the Master of the Rolls cannot be sustained. The notice of motion before him was that the report of the referee should be altered or varied, or remitted for amendment, and it seems to me clear that it could not have been properly altered or varied. How is it possible for the Master of the Rolls to alter or vary the report of the referee? Accordingly, when you look at the order made by the Master of the Rolls as it is drawn up, it is this: "Upon motion this day made that the report be altered or varied or remitted," &c. What does he proceed to do? Not to order any

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one of these three things, but the order says, "Upon hearing counsel, &c., this court doth order that the defendant do on or before a certain date pay £5,300 for damages in the action for non-performance of the contract." That is not anything prayed for by the motion, and it seems to me manifest, with great submission, that it is not warranted by any materials before him. It seems to me, therefore, that the order of the Master of the Rolls cannot be supported. Then what is to be done with the case? If the finding of the referee is not to be adopted, I do not see anything that can be done except to comply with the alternative prayer, that it be remitted to him for reconsideration; and I think it is due to the \*learned gentleman to say that we do not direct him to find differently to what he has found already. his conscience thinks he can only find the same thing over again, he must do so. He is the judge of the facts and not I wish it particularly to be understood that I should not have consented to give a judgment that the learned referee was wrong, he having had the witnesses before him. and having had an opportunity of judging how far those on the one side were more or less trustworthy than those on the other, without careful consideration of the materials upon which the Master of the Rolls acted.

I should like further to say for the assistance of the referee, that I think he should pronounce his decision and not give his reasons. I am now told that the Master of the Rolls has decided in some case that the referee ought to state his reasons. If he has done so, all I can say is that he gave a direction which a most experienced and learned judge said would, if acted upon by juries, render trial by jury impossible. If juries had to give reasons for their verdict, trial by jury would not last five years. The same thing cannot be said to such an extent with respect to a lawyer, let us hope, or otherwise it would be applicable to ourselves; but I think it would be a dangerous rule to lay down, that a man should give minute reasons for the

clusions at which he arrives.

[His Lordship then made some observations for the guidance of the referee as to the breach of the contract and the

measure of damages in the case, and continued:

I repeat that what I wish to say for the benefit of the referee is this. He is not to understand that he is told to reverse his decision and to adopt that of the Master of the Rolls. The thing is remitted to him for his reconsideration with an expression of an opinion by the majority of those who have heard the case that he was wrong in his conclu-

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sion, and no doubt he will consider it as impartially as it is possible for a man to do who has expressed an opinion upon the matter before, and will come to a correct conclusion. he can state any facts upon his report, or any figures that will enable the court to revise it and adopt a different conclusion—to adopt the report either wholly or partially—it may be done; for instance, he may say he acted upon the assumption that the plaintiffs could not sell without they 29] sold to \*the Manchester Corporation, or that he found 19s. a ton as the price, and so on.

The court made an order that it should be remitted to the referee to rehear the matter and report accordingly, with liberty to him to report specially any facts.

Solicitors for plaintiffs: Sharpe, Parkers & Co., agents for J. & J. Hibbert, Hyde.

Solicitors for defendants: Gregory, Rowcliffes & Rawle, agents for Cooper & Sons, Manchester.

[9 Chancery Division, 29.]

V.C.B., April 11: C.A., May 22, 1878.

OWEN V. WYNN.

[1875 O. 25.]

Practice—Inspection of Documents—Court Rolls—Action by a Person claiming adversely to the Lord.

The plaintiffs claimed to be owners in fee simple of certain land, and the defendant alleged that they were freehold tenants of a manor of which he was the lord; and that they had only customary rights over the land. The plaintiffs asked for inspection of the court rolls of the manor:

Held (reversing the decision of Bacon, V.C.), that they were not entitled to in-

spection.

This was an appeal from an order of Vice-Chancellor Bacon, made on an adjourned summons, upon an application to consider the sufficiency of the defendant's affidavit as to documents.

The plaintiffs, who claimed under Anne Warburton Owen, deceased, sought to establish their rights as tenants of the Warren Farm, Montgomeryshire, to a tract of mountain pasture or sheep walk as parcel of the Warren Farm, and to the mines and minerals under the tract, and to the rights of sporting over the same, and to the fences, and to all other usual incidents of the ownership in fee simple of freehold lands, in respect of the tract or sheep-walk. They also prayed an injunction to restrain the defendant (the lord of the manor) from pulling down or otherwise interfering with

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the fences forming the boundaries of the tract of pasture or

sheep-walk.

\*The plaintiffs derived their title to Warren Farm [30] under a conveyance of the lord of the manor in 1685, and they averred that the tract of pasture, or sheep-walk, formed part of the Warren Farm; that it had for more than sixty years before the commencement of the suit been held and used as parcel of the said farm by the tenants thereof, for the purpose of depasturing their cattle and sheep, and for other agricultural purposes, and been in the exclusive possession of the tenants of the farm; and that under the circumstances it must be presumed to have passed to the plaintiffs' predecessors in title, as part of the hereditaments conveyed by the deeds of 1685, and could not be presumed to be part of the wastes belonging to the defendant as lord or owner of the manor or reputed manor.

The defendant by his answer claimed to be entitled, as lord of the manor, to the soil of the sheep-walk in question, as forming part of the waste of the manor, subject to the right of the owner of Warren Farm for the time being as a freehold tenant of the manor, and of the other freehold tenants of the manor, to "lyerst," or the right of depasturing sheep or cattle over the waste; but the right claimed by the plaintiffs as owners of Warren Farm to the ownership in fee simple of the sheep-walk also, as part of the inheritance

of the farm, was denied.

A summons having been taken out for production by the defendant of documents in his possession, the defendant by his affidavit objected to produce the documents set forth in the first part of the schedule—which, so far as is material for this report, he described as "manor records, and court rolls, and copies thereof contained in five boxes, and a bundle of maps, plans, and drawings," on the ground that they related exclusively to his own title, and that none of them related to or tended to support or make evident the title of the plaintiffs, or any or either of them. Certain other documents in the defendant's possession were described as "a bundle of ancient deeds and muniments and a small bundle of several ancient MSS. marked C," without further enumeration or identification.

The summons was heard before Vice-Chancellor Bacon on

the 11th of April, 1878.

\*Kay, Q.C., and Elton, for the plaintiffs: As free- [31 hold tenants of the manor by the defendant's own admission, we are entitled to see the court rolls, and all records and documents relating to the manor. Warrick v. Queen's Col-

lege, Oxford ('); and the defendant's claim to privilege cannot be maintained. The terms in which protection is claimed are insufficient: Minet v. Morgan ('). The other documents are insufficiently described, and in order to entitle the defendant to have them protected from discovery, he must distinguish and specify the dates of the several instruments, and the names of the parties thereto: Hare on Discovery ('); Fortescue v. Fortescue ('); Combe v. Corporation of London (').

Sir H. Jackson, Q.C., and Freeling, for the defendant: The plaintiffs are not entitled to inspect the court rolls; they deny that they are tenants, and their action is entirely based upon that denial. If they are tenants of the manor, they have only customary rights over the sheep-walk, the free-hold of which they claim. If they had acknowledged that they were tenants of the manor, they might use the court rolls, but not otherwise.

Kay, in reply.

BACON, V.C.: No doubt there are imperfections in the affidavit, which in another affidavit may be easily cured if insisted upon. But the main point is as to the customary Upon the authority of Warrick v. Queen's College, Oxford, there is, I think, no reason suggested why the plaintiffs should not see them. The plaintiffs' suggestion is that they are freeholders of certain lands. The lord of the manor says, "No doubt you are a freehold tenant, but your tenancy is subject to my paramount rights," and he proposes to exercise those paramount rights. He can only exercise them, being lord of the manor, and the plaintiffs can only hold subject to that exercise, being tenants of the manor. Therefore the customary rolls become of necessity the things 32] to which reference is \*made for the purpose of proving one case or the other. The plaintiffs are not to come into court unprovided with the means of discussing that question By the defendant's own statement the with the defendant. plaintiffs are the customary tenants, and, as customary tenants, they have a right to inspect the rolls. That is the real point in dispute between the parties; there is nothing else in it. The slight inaccuracy which I referred to may be easily cured, but the affidavit I think is defective in that other respect which has been mentioned, viz., that the defendant does not say that the documents he objects to produce do not relate to the case made by the bill, which is the

<sup>(1)</sup> Law Rep., 3 Eq., 688. (2) Law Rep., 8 Ch., 361-363; 5 Eng. R., 590.

<sup>(\*)</sup> Page 278. (4) 34 L. T. (N.S.), 847.

<sup>(</sup>b) 1 Y. & C. Ch., 613.

The affidavit says they essence of the present application. relate exclusively to his own title, and do not prove the plaintiffs' title, but it does not say that they do not either prove or elucidate in some way the case made by the plaintiffs in their bill. In that case they have the right to discovery from the defendant.

From this decision the defendant appealed. The appeal was heard on the 22d of May.
Sir H. Jackson, Q.C., and Freeling, for the appellant.

They were stopped by the court.]

Marten, Q.C., and Elton, for the plaintiffs: According to the defendant's own statement, the plaintiffs are tenants of the manor; he cannot therefore resist our seeing the court rolls.

[JESSEL, M.R.: Is there any allegation in your bill that

you are tenants of the manor?

There is no direct allegation to that effect. One of our contentions, no doubt, is that we are independent freeholders; but if we fail on that point, we say that we are still entitled to rights over the sheep-walk as freeholders of the Therefore, with a view to that alternative, we have

a right to inspection of the court rolls.

JESSEL, M.R.: The plaintiffs say in their original bill that they are owners of \*a certain farm which consists in part of mountain pasture. They claim exclusive ownership of this pasture. The defendant says, "The allegations in your bill are all true except as to your title; you are really tenants of my manor, the pasture is part of my waste, and the acts which you call acts of ownership were really done in exercise of customary rights." Then the plaintiffs amend the bill; they do not admit the existence of the manor, and they deny that they are tenants of it. They then call upon the defendant to make an affidavit as to documents, and he makes an affidavit in which he says he has five boxes of documents relating to his manor. He swears that they relate exclusively to his own title, and do not tend to support the title of the plaintiffs, and he denies the right of the plaintiffs to see them. I should have thought, under these circumstances, that there was nothing to argue. The plaintiffs say they have a right to see the documents, although they claim adversely to the manor and the manorial rights, they say, "We should like to see your title before the trial, in order to pick holes in it." That is certainly not a course which the court will sanction. This case is not like Warrick

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v. Queen's College, Oxford ('). There the plaintiff alleged that he was a tenant of the manor; the only dispute was as to the extent of the customary rights, as to which the court rolls might furnish material evidence. The decision of the Vice Chancellor must be reversed.

James, L.J.: I am of the same opinion. When the case comes to be considered it is this: the plaintiffs say, "We hold certain freehold land which is our own absolute property, and we can prove it by certain acts." The defendant says, "No, it is my land." That is the sole question between them. Then the defendant says, "I have a number of title deeds which do not make out your title. I admit that you have limited rights over the land, which explain everything which would prima facie show your title; that is how I am going to displace your claim." The plaintiffs cannot say, "Let us see the evidence which you are going to use in support of your case." They are not entitled to do this.

34] \*Bramwell, L.J.: The way in which the case strikes me is this: the plaintiffs say, "If our claim is right, we are not entitled to see the documents; but we may be in the wrong, in which case we should be entitled to see them. Therefore, as we may be wrong, show them to us."

Solicitors: Milne, Riddle & Mellor, agents for Howell, Jones & Howell, Welchpool; Dean & Taylor, agents for Longueville, Jones & Williams, Owestry.

(1) Law Rep., 3 Eq., 683.

[9 Chancery Division, 84.]

V.C.M., May 2: C.A., May 29; June 5, 1878.

POWELL V. JEWESBURY.

[1876 P. 168.]

Demurrer to amended Statement of Claim-Partial Demurrer.

A defendant put in a statement of defence, not demurring to any part of the statement of claim. The statement of claim was amended, not making a substantially new case. The defendant obtained leave to amend his statement of defence, and put in a statement of defence and a demurrer to part of the statement of claim:

Held, that the rule of chancery practice, that a defendant cannot demur to what he has previously answered, is no longer in force; that leave to amend the statement of defence authorized the putting in a demurrer to part of the statement of claim; and that the defendant's pleading was regular.

that the defendant's pleading was regular.

A demurrer "to such part of the amended statement of claim as claims damages alleged to have been sustained by reason of the alleged wrongful acts of the defendant in opening the accounts therein in that behalf referred to":

Held, good in form.

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This was an appeal by the defendant from a decision of Vice-Chancellor Malins reserving to the trial the benefit of a demurrer to certain parts of an amended statement of claim.

The case made by the statement of claim was to the following effect: Skyrme, who died in April, 1873, was up to his death the solicitor of the plaintiff, who was a maiden lady. In July, 1873, Mr. Collins, her then solicitor, casually learnt from the solicitors of the Gloucestershire Banking Company at Ross, in Herefordshire, that the plaintiff had an account at their bank, and that they held deeds of hers as security. The plaintiff, who had never opened any account with them, caused inquiry to be made, and the \*company furnished her with copies of two accounts, the first of which had been opened by Skyrme in the plaintiff's sole name. It commenced in 1864 and closed in January, 1873, with a balance of £614 16s. 5d. to the plaintiff's debit. The second account was opened by Skyrme in the joint names of the plaintiff and F. J. Partridge. It commenced in 1865 and ended in June, 1873, with a balance of £470 10s. to the plaintiff's debit. Skyrme was in the habit of drawing checks on the first account, which he professed to sign as the plaintiff's agent, and by the end of June, 1866, he had overdrawn it to the extent of more than £2,000, but he from time to time paid in various sums, so that in 1873, as mentioned above, the account was overdrawn only to the extent of £614 16s. 5d. All these transactions were without the plaintiff's knowledge, the only check she ever drew upon the bank was one for £1,650, which she drew by Skyrme's direction to enable him to pay for some property which she was purchasing, and she drew it in the belief that some money of hers which had been called in for the purpose of the purchase had been lodged by him with the bank for safety.  $\bar{\ }$ This £1,650 formed one item in the first ac-On the 11th of June, 1874, the bank commenced an action to recover from Miss Powell the balance of both accounts, but shortly afterwards abandoned the claim on the second account. On the 18th of August, 1874, they filed a bill in chancery to foreclose the plaintiff in respect of a deposit security which Skyrme had given in her name, but they afterwards allowed this bill to be dismissed for want of prosecution, and proceeded with the action solely for the recovery of the £1,650 for which the plaintiff had drawn a The action came on for trial, but was referred to arbitration, and in May, 1876, the arbitrator made an award against Miss Powell for £500 5s. 8d. and costs, the ground being that she had incurred a liability by signing the check

25 Eng. Rep.

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for £1,650. Miss Powell then commenced this action in July, 1876, against the public registered officer of the banking company, alleging the above facts, and that Skyrme had paid to the company various sums of money, with notice that they were the plaintiff's money, and for which she had never had credit, and that any memorandum of deposit of deeds purporting to be executed by the plaintiff was a forgery, and the plaintiff claimed, 1, to have a \*general account taken of the dealings between the plaintiff and the bank; 2, to have her deeds delivered up to her, and any memorandum of deposit delivered up and cancelled; 3, an injunction to restrain the company from parting or dealing with the deeds, and from enforcing the award until the deeds had been given up to the plaintiff; and, 4, damages sustained by reason of the wrongful acts of the company.

The defendant put in a statement of defence, not demurring to any part of the statement of claim. The plaintiff then amended her statement of claim, and introduced. among other things, the allegation that Skyrme had advanced moneys of the plaintiff to Partridge on two bonds conditioned for securing the repayment of it to the plaintiff; that those bonds were among the securities of the plaintiff which Skyrme had deposited with the bank, and that the bank had given them up to Partridge without the plaintiff's authority, and without her ever having received the money due on them. The relief asked was modified as follows: Instead of a general account, an account was asked only of the money or other consideration paid or given to the bank for the delivery up of the bonds to Partridge; and the prayer for damages was "for damages sustained by reason of giving up the bonds, and of the wrongful acts of the said company in opening the said accounts and otherwise."

The defendant, on the 18th of March, 1878, applied by summons for leave to demur as well as plead to such part of the amended statement of claim as asked an injunction and as asked damages by reason of the alleged wrongful acts of the company. This application was refused. The defendant, however, having obtained an order to amend his statement of defence, delivered a demurrer and amended statement of defence, by which he demurred, 1, "to so much of the amended statement of claim as seeks an injunction to restrain the defendant and the above named company from enforcing the award in the amended statement of claim in that behalf mentioned, by execution or otherwise, until the bonds, deeds, and documents therein also mentioned

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shall have been given up;" the ground of demurrer alleged being that the award appeared from the statement of claim to be a proceeding in another Division of the High Court of Justice which could \*not be restrained by injunction; [37] and, 2, "to such part of the amended statement of claim as claims or seeks to recover damages alleged to have been sustained by reason of the alleged wrongful acts of the company in opening the accounts or alleged accounts therein in that behalf referred to, and otherwise;" the ground of demurrer alleged being that it did not appear by the amended statement of claim that the company had done any wrongful act (or, at all events, any wrongful act other than and besides the giving up of the bonds therein particularly mentioned, if such act were wrongful, which the defendant did not admit), or any other act other than as aforesaid constituting a legal wrong, that would support an action. The demurrer was heard before Vice-Chancellor Malins on the 2d of May, 1878.

J. Pearson, Q.C., and Ingle Joyce, for the demurrer. Glasse, Q.C., and Colt, contrà, were not called upon.

Malins, V.C.: I must order the benefit of this demurrer to be reserved to the hearing. I think the court ought to discourage demurrers to parts of statements of claim where the whole matter ought to be disposed of, and so multiplying the hearings, instead of diminishing them by having the case disposed of once for all. Nothing can be more inconvenient and more detrimental to the administration of justice than multiplying proceedings by demurring to part of the relief prayed by the claim. First, I am told that the defendant demurs to the 3d paragraph of the prayer, then it turns out that he only demurs to the latter part of that paragraph, and then to part of the 4th paragraph. I wish it to be known that I entirely set my face against such a practice; and I hope it will be made known to the profession that parties who take that course, if they come before me, will probably have to pay the costs of it.

The defendant appealed. The appeal came on to be heard

on the 29th of May.

J. Pearson, Q.C., and Ingle Joyce, for the appellant: The demurrer ought to have been allowed, and not reserved to \*the hearing. There is no power to restrain the [38 proceedings on the award in the Queen's Bench Division: Judicature Act, 1873, s. 24, r. 5. Then we demur to the relief on the merits. The whole case has been gone into before the arbitrator, and been decided upon. It is manifest

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that the plaintiff has suffered no damages from the opening of the account, but has received a benefit, for she has obtained the benefit of Skyrme's payments, which have reduced

her liability by two-thirds.

Glasse, Q.C., and Colt, for the plaintiff: A defence was put in to the statement of claim without any demurrer. Then the statement of claim was amended, not making a new case, and the defendant demurs. That is not admissible: Attorney-General v. Cooper (1).

[JESSEL, M.R.: That was the old practice, and was a branch of the rule that an answer overruled a demurrer.

That rule is not now in force.

Then we say the defendant was irregular in demurring under an order to amend his statement of defence.

[JESSEL, M.R.: I do not know of any rule against his

doing so. ]

Then as to the form of the demurrer. Order xxvIII. rule 1, of Rules of Court, 1875, gives leave only to demur to a part of a pleading setting up a separate cause of action; and form 28 in Sched. C, to the Judicature Act, 1873, contemplates the pointing out the paragraphs containing the allegations demurred to, otherwise the plaintiff cannot tell what is to be taken as struck out under Order xxvIII. rule 10, if the demurrer is allowed. There is a right to damages for the detention of the deads, which comes in under the words "or otherwise," and the demurrer as to damages cannot be allowed.

JESSEL, M.R.: I think that this demurrer ought to have been allowed. It is a question of fair substance that we have to look at. It was said that a party could not demur in this way, but I can see no reason why he should not. substantial part of the action is demurred to, the defendant saying that there is no cause of action \*as to two things in respect of which separate relief is claimed, and

upon separate allegations.

First of all the plaintiff says that the defendants brought an action at law for the recovery of an item of £1,650; the plaintiff pleaded, and when the action came on for trial it was at the last moment, under great pressure, referred to arbitration. The arbitrator, on the 29th of May, 1876, made an award against the plaintiff for £500 5s. 8d. and That was an award in an action not pending in this The plaintiff now asks for an injunction to restrain the banking company from enforcing the award, by execution or otherwise, until some deeds and documents are C.A. Powell v. Jewesbury.

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delivered over. The answer is that this is a proceeding pending in another Division of the High Court of Justice. Of course the award in an action can be enforced by entering up judgment in the division in which the action is brought, and by issuing execution on that judgment. if a defendant, in such a case, has anything to complain of, it must either be something which he could have alleged by way of defence to the action, or it must be something which he could not have so alleged, because it came to his knowledge after the award was made. If it is in the first category, he should have pleaded to the action; if it is in the second, he should have made a motion in the Division of the High Court to which the action belongs to stay proceedings in the action, either wholly or partially, according to the remedy to which he has discovered himself to have become entitled. But in no way and under no circumstances can a judge of another division interfere at all as regards that action by way of injunction to restrain proceedings in it, and therefore the demurrer appears to me as to this part of the case to be well founded.

The other part of the case passes my comprehension. relates to the damages claimed for opening an account in a lady's name by a solicitor named Skyrme, who is alleged to have committed a fraud upon her, to have forged her name, and to have opened the account without her authority. It appears he induced the lady, who is the plaintiff, to sign a check for £1,650, which was duly honored by the bank, and the bank brought an action in respect of the money they had paid on the check, which was actually signed by That was referred to arbitration, and before the arbitrator \*the lady got the benefit of an amount standing to her credit in the books of the bank in the account opened without her authority, and thereby the damages were reduced to this sum of £500 5s. 8d. How the opening of the account, the ultimate effect of which was to relieve the plaintiff of upwards of £1,100 out of the £1,650, could be made a ground for maintaining an action for damages against the defendants, as I said before, I for one do not understand. It appears to me that the demurrer on this ground ought also to be allowed.

Then comes another small ground of argument on the demurrer to which I will shortly refer. The defendants have demurred to the claim for damages for opening of the account "and otherwise," not demurring to the damages asked for for giving up the bonds. The answer made is, that if you scan this long statement of seventeen printed

pages very narrowly you will find it alleged that some seventeen years ago the solicitor of the plaintiff got possession of deeds belonging to her which were deposited with the bank without her authority, that they were asked to give them up, and that they did not do it, and then it is said they alleged they had a claim upon them. Then it is said that for this detention of the deeds the plaintiff, though she has not alleged any damage, would possibly get a farthing, or some nominal damages under the words "and other-But it appears to me that defendants are not bound There are two distinct to scan pleadings in this way. grounds alleged, one for delivering up the bonds to Mr. Partridge, and the other is the opening of the account, as to both of which the plaintiff alleges she has sustained damage. does not appear to me that when a plaintiff puts that forward as having been the ground on which she claims damage, a defendant is bound to look through a long statement of claim like this, containing many immaterial allegations, in order to discover whether something else which will support a claim for nominal damages is to be found in I think that if a plaintiff were allowed to avail himself of this kind of suggestion in order to defeat a demurrer, it would simply be a trap for the opposite party.

It seems to me, therefore, that the right course to take is to allow the demurrer as it stands, without reserving any right to the plaintiff under the words "and otherwise."

\*Bramwell, L.J.: I am of the same opinion; and, without again going over the ground covered by the observations of the Master of the Rolls, I will merely say this. In the first place, I do not at all share Mr. Glasse's difficulty. It seems to me it was intended by the act, whenever there was a new statement of claim filed and a different case made for the defendant to answer, that he is as much at liberty to demur as he was before. As to the subsequent claim for an injunction, it seems to me that the defendant is This action would be maintainable in the clearly right. Queen's Bench Division, the Chancery Division having now no exclusive jurisdiction over a matter of this kind, and it certainly would have been a curious thing for an action to be brought in the Queen's Bench Division for an injunction to restrain the defendant from enforcing his judgment in another division. Then there is this strange thing also. The prayer is for an injunction to restrain the defendant from enforcing the award by execution or otherwise until the bonds, deeds, or documents shall have been given up. What connection have the two things with each other? Here

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is a judgment which the statement of claim supposes to be valid and enforceable, but because the plaintiff says she has some other claim against the defendant the defendant is to

be enjoined from enforcing that judgment.

Then as to the other point, it is perfectly manifest that the opening of the account was unauthorized according to the statement of claim, and, therefore, if any damage had resulted to the plaintiff from it that would have been a cause But it is manifest not only that no damage resulted to her from it, but that a good resulted to her from it, because she drew this check for £1,650, and if, as she stated, she had no assets in the hands of the defendants at all, it was really a request by her to them to pay for her accommodation the amount of £1,650, and but for the account having been opened she would have had to repay it As to the statement that that amount had been abstracted from the account, that is true; but it was abstracted. by the same man who had fed it, and taking his abstractions and his feedings together, it is clear that it was a benefit to her.

Then with regard to the words "and otherwise," the claim is in \*fact for damages sustained by reason of opening the said account "and for damages otherwise sustained by the plaintiff," not in any way identifying them so that the defendant could know how to address himself to them. should think that upon this statement of claim, taking it to be true, as we are bound to do upon this demurrer, there is matter shown which would entitle the plaintiff to damages for an actionable detention of deeds, but I think that the demurrer ought not to be held to be bad on the ground that those words "and otherwise," the meaning of which is indistinct, and which are not at all identified, might cover a claim for nominal damages.

JAMES, L.J.: I am entirely of the same opinion.

Solicitors: Cook & Jonas; Thomas Fortune.

Leach v. Jay.

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[9 Chancery Division, 42.]

C.A., June 7, 1878.

LEACH V. JAY ('). [1877 L. 40.]

Will-Construction-" Die seised"-Wrongful Possession by Strangers.

R., being seised of freehold houses, died intestate in 1864, leaving A. his sole heiress-at-law. Upon R.'s death, his widow wrongfully entered into possession, and retained possession till her death in 1869, when her devisees entered. A. died in 1871, without ever having entered into possession of the property, having devised to L. all real estate (if any) of which she might die seised.

An action having been brought by L. against the devisees of R.'s widow for recov-

Held, on demurrer (affirming the decision of Jessel, M.R.), that "seised." being a purely technical word, and there being no qualifying context, it must be construed according to its technical meaning; and that as A. at the time of her death had no seisin at law or in fact, the property did not pass under her devise.

This was an appeal from a decision of the Master of the

Rolls (\*).

\*The statement of claim alleged as follows:— 431

Robert Roberts died in 1864 intestate as to his real estates. leaving Anne Roberts his sole heiress-at-law, and thereupon his real estates descended to and became vested in Anne Roberts as such heiress-at-law, and remained so vested, and she had seisin in law thereof at the time of her death.

The said R. Roberts was at the time of his death seised of certain freehold houses at Brighton, a freehold house at E., in the county of Surrey, then or late in the occupation of W., and two freehold houses at L., in the said county of Surrey, then or late in the occupation of E. and another.

Upon the death of R. Roberts, his widow, Mary Roberts, under color of a pretended will of her husband in her favor, entered into possession of the said real estates, and retained possession of them until her death in 1869, whereupon her devisees, the defendants, entered into possession of them.

Anne Roberts died in 1871, having by her will, dated in 1870, after giving her residuary personal estate to the plaintiff, John Leach, devised as follows: "I also bequeath and devise to him" (the plaintiff) "all real estate (if any) of which I may die seised."

The defendants having refused to deliver up possession of the houses to the plaintiff, or to recognize his title thereto as Anne Roberts' devisee, he brought this action, claiming to have his title established, and to recover possession, with consequential relief.

<sup>(1)</sup> Affirming 28 Eng. Rep., 106.

<sup>(\*) 6</sup> Ch. D., 496; 23 Eng. Rep., 106.

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The several defendants demurred to the statement of claim on the ground that Anne Roberts' will did not, under the circumstances alleged in the statement of claim, pass the property or any right of entry thereon to the plaintiff, or, in other words, that Anne Roberts was not seised of the property at the time of her death.

The Master of the Rolls allowed the demurrer, and from

this decision the plaintiff appealed.

Davey, Q.C., and H. A. Giffard, for the appellant: Even if the word "seisin" is construed technically, Anne Roberts was "seised" of the land. Although she was not seised in deed she was so in law. The distinction between seisin in law and in deed is maintained in all the text writers, and the mere \*fact of wrongful possession by [44 a stranger is not enough to destroy the seisin in law: Cruise's Digest('); Watkins on Descent('); Mozley and Whiteley's Law Dictionary, "Seisin"; Jacob's Law Dictionary, "Seisin"; Williams on "Seisin" (); Co. Litt. (). But it is unreasonable in the present day to confine the word "seisin" when used in a will to its technical sense. The legal incidents of "seisin" are obsolete; an absolute right to the legal freehold is all that is now regarded by the law: 3 & 4 Will. 4, c. 27, s. 39; 3 & 4 Will. 4, c. 106; 1 Vict. c. 26, s. 2; Taylor v. Horde (\*). The testatrix probably did not know the technical meaning of the word, and therefore could not have meant to use it in its technical

Cookson, Q.C., Chitty, Q.C., Ince, Q.C., Hadley, Byrne, and Borrett, for the several defendants, were not called on.

James, L.J.: I do not think we can differ from the Master of the Rolls in this case. This lady, for some reason or motive of her own, or for no reason, chose to use one of the most technical words in our law. The word has acquired no other meaning than its technical meaning, it has never got into ordinary use; therefore we are not at liberty to attribute to it any other meaning merely because we suppose that the testatrix did not know the true meaning of the word. It has been argued in favor of the appellant that seisin now has lost its distinctive meaning, that all its consequences have long ceased to exist, and therefore that you cannot predicate of anything that a testator died seised of it in any other sense than that it was part of his real estate. I am of opinion that there are such things as seisin and dis-

<sup>(1)</sup> Tit. I, sect. 20.

<sup>(2) 4</sup>th ed., p. 43. (3) Page 5.

<sup>(4) 29</sup> a, 266 b, 358 b.

<sup>(5) 2</sup> Sm. L. C., 7th ed., p. 584.

C.A.

seisin still. Mr. Joshua Williams says in his late book on Seisin (1): "If a person wrongfully gets possession of the land of another he becomes wrongfully entitled to an estate in fee simple, and to no less estate in that land; thus, if a squatter wrongfully incloses a bit of waste land and builds 45] a hut on it and lives there, he acquires an estate \*in fee simple by his own wrong in the land which he has inclosed. He is seised, and the owner of the waste is disseised. It is true that, until by length of time the Statute of Limitations shall have confirmed his title, he may be turned out by legal process. But as long as he remains he is not a mere tenant at will, nor for years, nor for life, nor in tail; but he has an estate in fee simple. He has seisin of the freehold to him and his heirs. The rightful owner in the meantime has but a right of entry, a right in many respects equivalent to seisin; but he is not actually seised, for if one person is seised another person cannot be so." Upon the allegations in this statement of claim, it appears to me that Mary Roberts was in the position of the squatter in Mr. Williams' book, that she squatted on the land, and that she and her heirs acquired an estate in fee by wrong which in time might eventually be turned into a rightful estate. was seised, and as no one can be seised and disseised at the same time, the testatrix was not at the time of her death seised of the land in question. The appeal must therefore be dismissed with costs.

BAGGALLAY, L.J.: I am of the same opinion.

Bramwell, L.J.: I also am of the same opinion. I will only add one observation with respect to an argument of Mr. Davey which impressed me. He said that in all probability the testatrix did not know the technical meaning of the word seisin, and that the court ought not to attribute to her a meaning which she did not herself attach to it. But we must attach some meaning to the word, and if we are not to take the proper meaning, but some other meaning, what other meaning is it to be? If we are to guess at the meaning which the testatrix attached to the word, where are we to stop? Therefore it seems to me that the word must either be meaningless, or else must have its proper technical meaning.

Solicitors: Paterson, Snow & Bloxam, agents for R. A. White, Grantham; White, Borrett & Co., agents for Taylor & Newborn, Epworth; F. F. Smallpeice, agent for Smallpeice & Sons, Guildford.

Frearson v. Loe.

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[9 Chancery Division, 48.] M.R., Feb. 5, 6, 1878. \*FREARSON V. LOE.

Γ**4**8

[1876 F. 134.]

Patent—Validity—Novelty—Partial Anticipation of Invention—Threatened Infringement—Imitation for Purpose of Experiment—Injunction.

A specification is not invalid by reason of its describing an invention part of which was not new at the date of the patent, if, after eliminating what was old, a residue is left of sufficient utility, in which case the residue, if properly claimed, will be a proper subject-matter for the grant of letters patent.

A patentee can sustain an action for an injunction to restrain a threatened infringe-

ment of his patent, even if no actual infringement has taken place.

When articles which are the subject of a patent are made without a license from the patentee simply for the purpose of bona fide experiments, those who so make them are not necessarily liable to an action, but when they are made and used for profit, or with the object of obtaining profit even to a limited extent, such making and using constitute an infringement of the patentee's rights, and will be restrained by injunction.

This was an action to restrain the alleged infringement by the defendant of certain letters patent granted to the

plaintiff.

By letters patent under the Great Seal (No. 1,971 of the series for the year 1870), dated the 12th of July, 1870, Her Majesty granted to the plaintiff the sole use within the United Kingdom, for the term of fourteen years, of an invention of "improvements in screws and screw-drivers and in machinery for the manufacture of screws," as the same was described in the specification thereof, subject to the condition as to filing a specification within six months next after the date of the letters patent.

On the 11th of January, 1870, the plaintiff, in performance of the condition, filed a specification describing the nature of the invention, which, so far as material, was as follows (the paragraphs being numbered for convenience of ref-

erence):-

1. "My improvements in screws consist, first, in making the slit or groove in the head of the screw, commonly called the nick, of a curve of short radius, so that the said nick may be of great depth at the centre of the head, and terminate within the edge of the head; or the deep nick terminating within the edge of the head \*may be made of [49 other figure than a circular one. By thus making the nick so that it does not extend all across the head the tendency of the head of the screw to burst under the action of the screw-driver is prevented or diminished, and the injury to

which an article is exposed during the driving of the screw by the screw-driver protruding from the head of the nick is avoided. I make the said nicks in the heads of screws in various ways. They may be made by circular saws of small diameter, or by cutters, or by means of a suitably shaped punch or pressing tool worked in the machine by which the heading of the blanks is effected. In screws made by casting the said nicks may be made by the casting process.

2. "My improvements in screws consist, secondly, in making two or more nicks of the kind described in the head of the screw. When two nicks are made they cross each other at right angles at the centre of the head. When three nicks are made they cross each other at the centre of the head, each nick making with the adjacent one an angle of about sixty degrees. I prefer in all cases where more than one nick is made that the nicks cross each other so that the circle shall be equally divided by the said nicks. These crossing nicks may be made by sawing, cutting, pressing, or casting.

3. "My improvements in screw-drivers consist in making the end or acting part of the screw driver of the form of the nick or nicks hereinbefore described in the head of the screw. For screws with two or more nicks crossing one another, I prefer to make the screw-driver from iron or steel, grooved or fluted, so as to have the figure proper to make it fit into

the said crossing nicks.

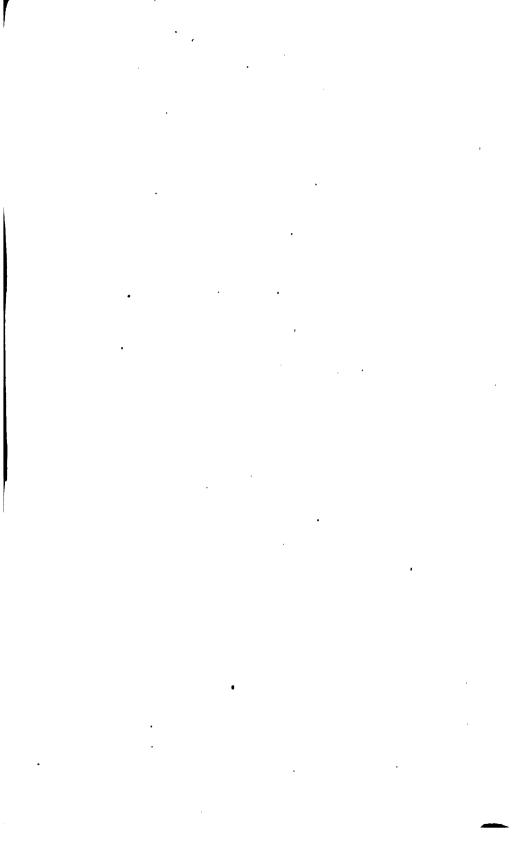
4. "Screw-drivers made according to my invention, used with screws made according to my invention, have the advantage that, when introduced into the nick or nicks of the screw and pressure is applied to them, the end or acting part takes at once its proper axial position with regard to the screw, and the force used for screwing and unscrewing the said screw is applied in the most advantageous manner."

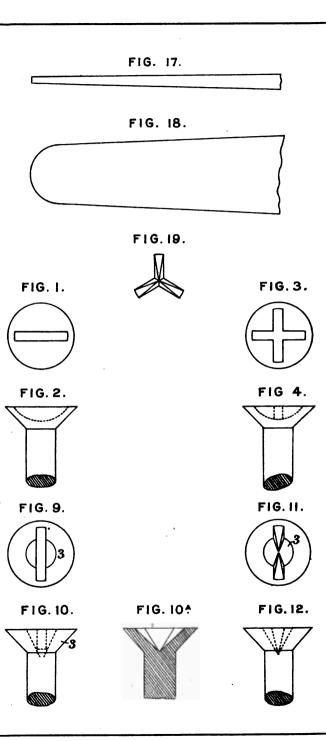
The specification then described (paragraph 5) the plaintiff's improvements in machinery, consisting of certain ar-50] rangements or \*combinations of parts for forming the nicks before described in the heads of screws, and proceeded

as follows:—

6. "Having explained the nature of my invention, I will proceed to describe with reference to the accompanying drawing the manner in which the same is to be performed.

7. "Figure 1 represents in plan, and figure 2 in vertical section, the head of a screw provided with a curved nick according to my invention. The said nick is made of a curve of short radius, the greatest depth of the said nick





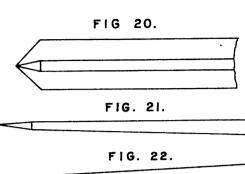


FIG. 5.







FIG.13.



FIG. 14.



FIG. 7.



FIG. 8.

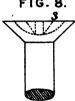


FIG.15.



FIG. 16.



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being in the centre of the head, the ends of the nick terminating within the edge of the head.

8. "Figure 3 represents in plan, and figure 4 in section, the head of a screw in which two nicks of the kind represented in figures 1 and 2 are employed, the said nicks being situated at right angles and crossing one another at the

centre of the head.

9. "Figure 5 represents in plan, and figure 6 in section, the head of a screw provided with a single nick of the kind represented in figures 1 and 2 in combination with a con-

ical-shaped central recess marked 3.

10. "Figure 7 represents in plan, and figure 8 in section, the head of a screw provided with a double nick in combination with a conical-shaped central recess 3. By means of this central recess 3 great facility in the use of the screw-driver is obtained, as the said recess conducts the said screw-driver at once to the centre of the screw head and from thence to the nick. The said recess also facilitates the manufacture of the nick or nicks.

11. "Figures 9, 10, and 10", represent in plan, elevation, and section respectively the head of a screw in which the single cross nick is made of an angular figure instead of the curved figure represented in figures 1 and 2, the said angular shaped nick being represented in combination with a conical

central recess 3.

- 12. "Figures 11, 12, 13, 14, 15, and 16 represent other forms of nicks made according to my invention. In these forms of my invention the single or compound nicks in the heads besides being angular have their sides inclined to one another or of a V shape, the narrowest part of the V nicks being in the centre of the head where the several nicks meet, as will be understood by an examination of the drawing. In figures 11 and 12 a central recess is represented combined with a V-shaped nick. The advantage of the V-shaped \*angular nicks over curved nicks is that one screw- [51] driver will suit all sizes of screws.
- 13. "It is well known to persons who use screws that if the nicks are narrow and shallow it is difficult to drive the screw without the screw-driver slipping out of the nick, and, if the nicks are wide and deep to afford a good grip, the head of the screw is weakened and the screw-driver is liable to slip out sideways and deface the finished surface of the work, and if the screw-driver is the same width as or wider than the head of the screw the countersunk work is liable to be defaced and the angles of the screw-driver are often broken.

14. "By the use of screws and screw-drivers constructed according to my invention these inconveniences are prevented or diminished. The improved nicks being much deeper in the centre than the ends the screw-driver takes a firmer grip of the screw than with nicks of the ordinary kind. The screw-driver is also kept central, and if but slightly pressed it cannot slip out of the nick or deface the work. As the nicks of screws made according to my invention can be made much wider than those of the ordinary screws without weakening the heads a stronger screw-driver may be used and the liability of the screw-drivers to break thus diminished.

15. "Figure 17 represents in edge view and figure 18 in front elevation the acting end of a screw-driver constructed according to my invention to be used with screws having nicks of the forms represented in figures 1, 2, 3, 4, 5, and 6.

16. "Figure 21 represents in edge view and figure 22 in front elevation the acting end of a screw-driver constructed according to my invention to be used with screws having nicks of the forms represented in figures 9, 10, 11, 12, 13, and 14.

17. "Figure 19 represents in end elevation and figure 20 in side elevation the acting end of a screw-driver constructed according to my invention, the said screw-driver having three branches to fit it to be used with screws having nicks of the kind represented in figures 15 and 16. The screw-driver, figures 19 and 20, may be made from long rods shaped by rolling, the said rods being cut into suitable lengths and their ends shaped to fit the nicks of the screw heads."

52] \*18. The specification then described with reference to the drawing the plaintiff's improvements in machinery and tools for forming the several kinds of nicks thereinbe-

fore described, and continued as follows:—

19. "Having now described the nature of my invention, and the manner in which the same is to be performed, I wish it to be understood that I do not limit myself to the precise details herein described and illustrated, as the same may be varied without departing from the nature of my invention; but I claim as my invention of improvements in screws and screw-drivers, and in machinery for the manufacture of screws,—

"Firstly. Making one or more curved nicks in the heads of screws, the said nick or nicks being of greatest depth at the centre of the head, and terminating within the edge of the head, substantially as and for the purpose hereinbefore

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described and illustrated in figures 1 to 8, both inclusive, of

the accompanying drawing.

"Secondly. Making one or more nicks of an angular figure or of a combined angular and V figure in the heads of screws, the said nick or nicks being of greatest depth at the centre of the head, and terminating within the edge of the head, substantially as and for the purpose hereinbefore described and illustrated in figures 9 to 16, both inclusive, of the accompanying drawing.

Thirdly. Making a conical recess in the centre of the heads of screws, substantially as and for the purpose hereinbefore described and illustrated in figures 5, 6, 7, 8, 9, 10, 11, and

12 of the accompanying drawing.

"Fourthly. Constructing screw-drivers to be used with the screws enumerated in the previous claims, substantially as hereinbefore described and illustrated in figures 17 to 22,

both inclusive, of the accompanying drawing.

"Fifthly. The combinations or arrangements of parts hereinbefore described and illustrated in figures 23, 24, 25, and 26 of the accompanying drawing for supporting and steadying the saw and saw shaft of machinery to be employed in cutting curved nicks in the heads of screws.

"Sixthly. The combination or arrangement of the parts of machinery hereinbefore described and illustrated in figures 27, \*28, 29 and 30 of the accompanying drawing, [53]

for cutting angular nicks in the heads of screws.

"Lastly. The construction of the punches hereinbefore described and illustrated in figures 31 to 36, both inclusive, of the accompanying drawing, and similarly constructed punches for punching V-shaped nicks in the heads of screws."

By letters patent under the Great Seal (No. 2,005 of the series for 1875), dated the 1st of June, 1875, Her Majesty granted to the plaintiff the sole privilege to make and use within the United Kingdom, for the term of fourteen years, an invention of "improvements in the manufacture of certain kinds of screws, and in tools and machinery to be used in the manufacture, as the same was described in the specification thereof, subject to the usual condition as to filing a specification.

On the 27th of November, 1875, the plaintiff, in performance of the condition, filed a specification describing the na-

ture of the invention.

On the 19th of October, 1876, the plaintiff issued his writ, and subsequently delivered his statement of claim.

The plaintiff alleged that the said letters patent of the 12th of July, 1870, and the 1st of June, 1875, respectively, were valid, and the improvements thereby respectively protected

were novel, useful, and valuable.

The plaintiff alleged that the defendants had since September, 1876, manufactured machinery or tools, and had manufactured or sold screws or screw-drivers according to or only colorably differing from those which were the subjects of the inventions comprised in the letters patent to the damage of the plaintiff, and threatened to continue the use of the machinery or tools, and the manufacture or sale of screws and screw-drivers as before mentioned; and claimed, first, damages for the injuries complained of; secondly, that the defendants might be restrained by injunction from manufacturing or using machinery or tools, and from manufacturing or selling screws or screw-drivers, according to or only colorably differing from the inventions comprised in

the letters patent.

The defendant William Clarke Loe, on the 27th of February, 1877, delivered his original statement of defence and counter-claim, \*and thereby claime dthat he was entitled to use the said machinery and to manufacture therewith screws and screw-drivers, and said that it was his intention to do so if and as soon as he was able to perfect the said machinery so that he could manufacture the same at a profit. He further set up an agreement of the 10th of August, 1873, whereby he alleged that the plaintiff agreed to sell to him (W. C. Loe) and others all the plaintiff's interest in the said letters patent of the 12th of July, 1870, and in any subsequent letters patent for perfecting the said machinery for the price named, which agreement the plaintiff had refused to sign. He further alleged that he had advanced various sums of money to the plaintiff for the purpose of experiments with the said machinery, which the plaintiff had not accounted for; and he claimed by way of counter-claim that the plaintiff might be ordered to repay the said sums, or specifically to perform the said agreement; also that the plaintiff might be restrained from manufacturing or using machinery, or tools, or screws, or screw-drivers according to or only colorably differing from the inventions comprised in the letters patent.

An application was made by the plaintiff to strike out the said counter-claim as embarrassing, and it was agreed that it should be struck out, with liberty to amend the statement

of defence.

On the 3d of May, 1878, the defendant Loe delivered his

amended statement of defence, in which his former claim was abandoned; he denied that the plaintiff was the true inventor of either of the alleged inventions; he alleged that neither of them was novel, useful, or valuable, or such as by law could be made the proper subject-matter of a patent; and alleged that he was not infringing and never had infringed the plaintiff's alleged patents, or either of them.

The defendant Jabez James, besides denying the novelty of the alleged inventions, alleged as a further ground of defence that a machine which he had manufactured, which was an alleged infringement of the letters patent of September, 1875, was made from the tracings of drawings prepared under the joint superintendence of the defendant Loe and the plaintiff.

Among other specifications relied on as anticipations of the plaintiff's alleged invention was that filed by A. E. Newton on the \*27th of August, 1867, under letters [55 patent of the 27th of February, 1867, which contained the

following passages:—

"When screws or bolts are constructed in the ordinary manner (that is to say) with slotted heads, it has been found in practice that if the slot is made shallow the screw-driver will not have sufficient hold to drive the screw or bolt home, and by slipping and getting out of the slot it will soon so wear off the shoulders of the slot as to make it nearly impossible to move the screw either out or in, and that if on the other hand the slot is made deep there is a liability of breaking off one half of the head, rendering necessary a considerable expenditure of time and patience in removing the screw. These difficulties occur specially when it is necessary that the screws or bolts should be driven hard so as to have a firm hold.

"Now the object of the present invention is to obviate these difficulties, and to this end the invention consists in forming screws or bolts with a central hole in the head end (instead of the nick heretofore used) to receive a driver in the form of a plug which takes better hold for turning the screw."

The specification then contained a description of the figures, and added: "The lower end or part of the driver which enters the perforation is by preference made square, but this shape is not absolutely necessary, and any other shape, even a round driver can be used; the square form will however bite more firmly on the sides of the perforation."

"It will be observed that the perforations in the screws or bolts are slightly tapered, that is to say, they are a little 25 Eng. Rep. 95

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narrower at the bottom than they are at the top, to give the driver a better hold upon the inner surface of the perforation, and to compensate for any wear in the perforation or of the driver, that being the preferred form, to which, however, I do not intend to limit my claim of invention, as

other forms will answer the purpose.

"Having now set forth the nature of the invention of 'An Improvement in Screws and Bolts' as communicated to me from abroad, and explained the manner of carrying the same into effect, I wish it to be understood that under the above in part recited letters patent I claim, as a new manufacture, a wood screw, screw bolt, or other equivalent screw with a central hole to receive a plug as a driver, substantially as and for the purpose described."

[56] \*The action now came on for trial, and evidence was

gone into.

Aston, Q.C., and Macrory, for the plaintiff.

Chitty, Q.C., and Northmore Lawrence, for the defendant Loe: The plaintiff's patent of 1870 is invalid. At the commencement of his specification he says: "My improvements in screws consists, first, in making the slit or groove in the head of the screw, commonly called the nick, of a curve of short radius, so that the said nick may be of great depth at the centre of the head and terminate within the edge of the head; or the deep nick terminating within the edge of the head may be made of other figure than a circular one." These words are sufficient to include a nick of any figure whatever. Then, when the first part of the claim is examined, we read, "Making one or more curved nicks in the heads of screws, the said nick or nicks being of the greatest depth at the centre of the head, and terminating within the edge of the head." There is no novelty in the screw here described; and, according to the fair meaning of the specification, the invention has, as we contend, been anticipated by previous inventors. The V-shaped nick referred to in the specification and in the second claim was not new, and any kind of screw-driver could be applied to it.

There are several screws which anticipated the plaintiff's invention, especially the one known as "Drane's Screw," which was an anticipation of the first claim; an old kind of screw belonging to a can; the screw of Jabez James; and one other. At any rate, the plaintiff's V screw was antici-

pated by Newton's patent of 1867.

Even supposing the screws of Drane and Jabez James should not be held to be anticipations of the whole of the plaintiff's specification, they anticipated it in substance,

nothing of real value being left; and where the main and most material part of a specification fails, the patent fails altogether.

Further, we contend that there has been no actual infringement. There is no case in which a patentee has succeeded in maintaining an action for injunction on a mere

threat of infringement.

The defendant does not deny that a small quantity of screw \*blanks were made according to the two patents [57] of 1870 and 1875, but that was merely for the purpose of experiment, and not for the purpose of sale. This would give the plaintiff no right of relief. The machine also was only made for experimental purposes. Manufacture for the purpose of experiment is not an infringement: Jones v. Pearce('); Higgs v. Goodwin('); Muntz v. Foster(').

Davey, Q.C., and Lawson, for the defendant James,

against whom the action was dismissed.

JESSEL, M.R., after adverting to the facts of the case, which involved a conflict of evidence of a somewhat unusual

character, continued:

There are two patents claimed by the plaintiff. The first is the patent of 1870, as to which it is not denied that he was the inventor of the invention described in the specification. the defendant denies the validity of the patent on various grounds, and he also denies that he has infringed that patent. I will now examine the grounds of invalidity which he sets up.

It is said that the specification of the patent of 1870 is to be read in a particular way, and that, if so read, it has been The first thing is to see what it means, and then I think there will be no difficulty in dealing with the That patent is for an improvement in alleged anticipation. the manufacture of screw-heads and screw-drivers, but the point I have chiefly to consider refers to screw-heads. paragraph 1 of the specification, the plaintiff says, "My improvements in screws consist, first, in making the slit or groove in the head of the screw, commonly called the nick, of a curve of short radius, so that the nick may be of great depth at the centre of the head, and terminate within the edge of the head; or the deep nick terminating within the edge of the head may be made of other figure than a circu-

If the matter had stopped there, I do not think that the words "curve of short radius" are other than a description of the circular \*nick. I do not think any reliance can [58] be placed on those words, and if the matter had stopped

<sup>(1) 1</sup> Webs. P. R., 122. (2) E. B. & E., 529.

<sup>(\*) 2</sup> Webs. P. R., 93, 96,

there the nick might have been made of any length; but he goes on, "By thus making the nick so that it does not extend all across the head, the tendency of the head of the screw to burst under the action of the screw-driver is prevented or diminished, and the injury to which an article is exposed during the driving of the screw by the screw-driver protruding from the end of the nick is avoided." Now, all that, as it turns out, is not new. It is quite plain that screws were known years before in which the nick did not extend entirely across the head. He then proceeds: "I make the said nicks in the heads of screws in various ways," and then he says how he makes them. Then afterwards, speaking of his screw-driver (paragraph 4), he says: "Screw-drivers made according to my invention, used with screws made according to my invention, have the advantage that, when introduced into the nick or nicks of the screw, and pressure is applied to them, the end or acting part takes at once its proper axial position with regard to the screw, and the force used for screwing and unscrewing the said screw is applied in the most advantageous manner." That peculiar action or position is again an improvement which he dilates upon as being an improvement as well as the other improvement previously mentioned.

Here, it must be observed that it does not follow that, because an inventor thinks he has invented more than he has in fact, and describes the advantages of his invention, and some of those advantages arise from an old portion of the invention, it may not still be a good patent, provided that the invention as claimed is so limited as to fail to cover the actual thing in use while it covers some of the advantages mentioned; in such a case it may still, no doubt, be a good patent. If it turns out that I can get from the description the benefit described in paragraph 4, without the benefit described in the previous paragraphs, it might still be a good

patent.

Then in paragraph 12 he gives another invention, and he now describes a nick in the shape of a V, the narrowest part of the V being the centre of the head where the sides meet. Then he says that the advantage of that is that "one screwdriver will suit all sizes of screws." There we have got a 59] special advantage of the \*V-nick described, which, of course, would not cover the circular nicks if they were old, which is the substantial part of the invention. He now takes up the circular nicks in paragraph 14: "The improved nicks being much deeper in the centre than the ends the screwdriver takes a firmer grip of the screw than with nicks of

the ordinary kind. The screw-driver is also kept central, and if but slightly pressed it cannot slip out of the nick or deface the work. As the nicks of screws made according to my invention can be made much wider than those of the ordinary screws without weakening the heads, a stronger screw-driver may be used, and the liability of the screw-drivers to break thus diminished." And then he says that

the figures represent views of the things described.

Stopping there, although, as is very usual in specifications, the language is open to a very great deal of criticism, I think, when you take the fact stated that the nick is much deeper in the centre than at the ends, that must apply to his curved screw nick (which of course, by being curved, would ordinarily be made deeper at the end), and therefore he intends to say that all his nicks are deeper at the middle than the ends, and that that is an integral part of his invention, because he states what are the advantages of it, and that is shown by a comparison of the figures. Therefore I think that, even under the claim itself, you have here a description as regards the circular-shaped nick, or the nicks of other than a circular shape, whatever they may be, that they are to be much deeper at the centre than at the ends.

Then, when we come to the claim, we find this. The first claim is as follows: "Making one or more curved nicks in the heads of screws, the said nick or nicks being of greatest depth at the centre of the head, and terminating within the edge of the head substantially as and for the purpose hereinbefore described and illustrated in figures 1 to 8, both inclusive, of the accompanying drawing." That, I think, again confirms the view I have taken of the passage I have read from paragraph 13, that the nicks in the heads of the screws must be of the greatest depth in the centre and must be curved; or, in other words, though they may be made of any other figure than a circular one, that does not get rid of the curving mentioned in paragraph 1, and, therefore, that part of the \*invention is, as put in the claim, a [60] curved nick of greatest depth at the centre. Therefore, if the curved nick with its greatest depth at the centre is new, and has advantages, it is, I think, a substantive invention, although another kind of nick is mentioned which What he claims is the combination, and he is not new. only claims the curved nick with its greatest depth at the centre of the head. It is manifest that what the plaintiff claims as the benefit derived from the curved nick arises from the fact of its being of greatest depth at the centre of

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the head, and that there is really an advantage derived from it.

Then it was stated that the V-shaped nicks were not new. and that you might use any kind of screw driver for them. Upon the point of anticipation, I will first deal with the screw they call Drane's screw. Drane's screw was not a screw used for any of these purposes; the great object which Frearson had in view was for application to screws to put That was his main object, but of course his screws might have been used for metal. When you look at Drane's screw you see that it is a screw with the head sloped the wrong way, that is, with a head instead of sloping downwards towards the shank of the screw, sloping upwards, and so, instead of making it to sink into the substance, it is made to stand outside, and therefore it could not be used for wood, and was not intended to be used for that purpose. In fact it was used as part of a chuck simply. and for nothing more—not even for ordinary purposes. the next place, the screw of Drane was very much hollowed out in the head, and very peculiarly hollowed out, and of course that would exceedingly weaken the head of the screw if it had been intended for ordinary screwing purposes. do not see the slightest possible resemblance to the curved screw with the greatest depth in the centre, because it was not a curved nick at all, but a nick with various slots, and the slot was not curved, nor was the depth at the deepest point different from the depth of any other part of the base, it was about as level as could be, and was intended to be made quite level. So that it varied in those two respects from the screw as described in the first claim of Frearson's patent of 1870, and varied altogether from the screw described in the second claim. Therefore I do not consider Drane's screw in any sense an anticipation of the screw 61] claimed \*by the first claim, and in my opinion it was a screw of a different kind, and had not the second set of advantages which are pointed out in Frearson's patent.

The next screw that I had pointed out to me was a screw belonging to a can, a very old form of screw, and, when you come to look at it, it does not bear the slightest resemblance to the plaintiff's except that the hole cut in the top of the screw was a square hole, and did not, like the nick, protrude across the head of the screw. Into that square hole was fitted a short bar, which was put into it, and the screw was turned in that way. It was not curved in any way nor was it deepest in the centre, nor had it any of the second set of

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advantages pointed out by Frearson. It does not appear to me that that is an anticipation.

Then there was shown to me a third screw, that of Jabez That was an old form of screw, and there is no doubt that was a genuine screw. That had a single slot across the head, terminating within the edge, and so far like the plaintiff's screw, one of the many in use at the time, though he does not seem to have known it. Then the sides were not cut parallel, they were slanted a little, like the sides of a chisel or punch, made so for that purpose, so that the screw-driver might not fit tight; the bottom was flat, and was not different in level at any point, either at the centre or anywhere else, from the level of the rest of it. It did not therefore come within the description, nor did it possess the advantages which come within the second set of advantages, which are obvious at once when you put in a semicircular screw-driver to the semicircular bottom of the hole. Therefore that was not an anticipation, except in so far as it was an anticipation of the nick being confined within the edge.

There was only one other screw shown me. It was not a screw in one sense, as it was not used exactly as a screw, but as a shank on which a nut was to be fastened, but the bottom of the shank was kept in position by something which had a slot in it. But that was also different, because, besides being, like Drane's, level at the bottom, it was a shallow and not a deep indentation at all, and not even sloped at the sides. It is not, therefore, in my opinion, an anticipa-

tion of the plaintiff's patent.

I now come to another ground raised by the defendant. It was \*said that atall events the screw made under Newton's patent of 1867 was an anticipation. It was not proved to me that any one ever saw any of those screws made, or that the patent ever came into use at all; but of course there might be sufficient publication even without that, and therefore I have to look at it as a publication. The first remark to be made about Newton's specification is this, what he wants to do is to make the slot deeper. says, "when screws or bolts are constructed in the ordinary manner, that is to say, with slotted heads, it has been found in practice that if the slot is made shallow the screw-driver will not have sufficient hold to drive the screw or bolt home, and by slipping and getting out of the slot it will soon so wear off the shoulders of the slot as to make it nearly impossible to move the screw either out or in, and that if, on the other hand, the slot is made deep there is a liability of

breaking off one half of the head, rendering necessary a considerable expenditure of time and patience in removing the screw." Then he is going to get rid of those difficulties, and what does he do? He makes a central hole in the head instead of the nick heretofore used. It is to be observed that the plaintiff's invention describes it as a nick. could not, in fact, describe the plaintiff's as a hole as regards the first part of his invention, though you might very fairly describe it so as regards the second part, that is to say, as regards the V-that might be described as a hole, that is the same idea to this extent, that it is a deep hole like the angu-Then he shows his figures, and he says: lar V screw-head. "The lower end or the part of the driver which enters the perforation is by preference made square, but this shape is not absolutely necessary, and any other shape, even a round driver can be used; the square form will, however, bite more firmly on the sides of the perforation." When you come to look at his sections you find that they agree with that, and that what he is using is in fact a circular hole cut very deep, into which he puts this driver. That is his description of it, and he puts into it either a square or round or angular driver of any shape, but he starts with a round hole. Of course it would not do to use a round driver as an ordinary rule, because the driver would turn round without the screw. I was told that a bar or round driver held at a certain slope would hold from the friction; but that is 63] \*not exactly what is claimed by the patent, it is that any shape will do, but not any particular form of round driver. When you come to look at that, you have got a round hole, or something of that sort; but as I said before, that is not at all like the semicircular nick used by the plaintiff, though it is very like the V, but the distinction is that the mere fact of the sides of the V catching it turns the screw, and in addition to that, the V driver has an advantage which could not be possessed to anything like the same extent by the circular driver, that is, by using the screwdriver for a great variety of screws as regards size. it is quite possible that the ordinary round driver as described here might be used for screws of different sizes, and therefore, to some very slight extent, it possessed that advantage, but it would not possess the whole of that advantage, nor anything like it. It appears to me, therefore, that if you take the first part of it, inasmuch as you have a circular hole, it is not an anticipation of Frearson's invention, and if you take the second portion for a tapering screwdriver, it is not an anticipation, because it is not the same

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contrivance, nor has it the same advantages as Frearson's. I think, therefore, that Newton's specification is not a sufficient anti-institute.

ficient anticipation.

The last objection taken to Frearson's patent was this: It was said, even supposing I should come to the conclusion that Drane's and James' screws were not an anticipation pure and simple of Frearson's specification, yet that they were an anticipation of the substance of it, and that what was left of Frearson's was not a sufficient residue to be worthy of a patent, and therefore it must be admitted that. the main part of the patent having been anticipated, the patent fails altogether, and that it must be a serious question whether the residue is sufficient. Now, I agree when you take away the first part of the description the second part is not so remarkable as the first. I do not say it is everything, but you have taken away a very considerable part of it when you show that making the nicks to terminate within the edge of the screw head is old. Still you must consider that the new portion of the invention is the subject of some invention, and it is very difficult to measure how much invention is required to effect the object aimed at. That is the first consideration, and in the next place you must consider whether there is any advantage \*attend- [64 ing the use of the residue in question, for that is always an important element of consideration. In other words, supposing you strike out of the description so much of it as was anticipated, you have to consider whether there would be still sufficient left, having regard to the advantage to be gained by it. I think there would.

First, you get a firmer grip of the screw by reason of its being deeper in the centre than by nicks of the ordinary kind; that is quite plain, and the moment you slope the screw-driver you see that. Then he says, "It cannot escape out of or deface the work;" that is an important advantage; and then he says, "as they can be made much wider than those of the ordinary screws without weakening the heads, a stronger screw-driver may be used and the liability of the screw-drivers to break be thus diminished." Well, that is an advantage. There are three advantages pointed out; and after all, when you come to consider what a screwhead is, there is not room for much or any considerable amount of ingenuity to be shown in varying it; and if a man by an improvement of this kind is enabled to make what is a substantial improvement, why should it not be worthy of protection? It is not because he has attempted to claim as an advantage something else to which he is not entitled,

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that the improvement he has made is to be held not worthy of a patent. I am not to say that, because even half of the advantages said to arise from his invention may not be new, he is not to be protected in respect of the other half. Another advantage referred to consists in enabling a screw-driver of any size to be used for a variety of screws of different sizes; that must be a very great help to the workman. On the whole, in my opinion there has been no anticipation proved of the invention claimed in the plaintiff's first specification of 1870, and I hold that there is sufficient novelty in it to support the patent.

novelty in it to support the patent.

The next point I have to decide is with reference to the patent of 1875. This patent is in form for a combination substantially constituting a machine for making screws or screw-heads, or screw blanks as they are called. It is a combination for manufacturing the blanks by this complicated, and, I may say, this beautiful machine in combination with 65] certain punches and dies of a peculiar \*kind which have been invented for the purpose, but there is nothing to show that it was an old machine, and although several prior patents were mentioned, that part of the case was not pressed in argument.

I am of opinion, therefore, that there is nothing in those prior patents relied on by the defendant to anticipate the plaintiff's. [His Lordship then referred to the conflict of evidence in the case.]

I now come to the next point in the defence, which, after all we have heard, is certainly rather a singular one, namely, that there is no infringement. Now, I am not aware of any suit or action in the Court of Chancery which has been successful on the part of a patentee without infringement having been proved; but in my opinion, on principle, there is no reason why a patentee should not succeed in obtaining an injunction without proving actual infringement. I think so for this reason. Where the defendant alleges an intention to infringe, and claims the right to infringe, the mischief done by the threatened infringement of the patent is very great, and I see no reason why a patentee should not be entitled to the same protection as every other person is entitled to claim from the court from threatened injury where that threatened injury will be very serious. No part of the jurisdiction of the old Court of Chancery was considered more valuable than that exercise of jurisdiction which prevented material injury being inflicted, and no subject was more frequently the cause of bills for injunction than the class of cases which were brought to restrain threatened injury as distin-

guished from injury which was already accomplished. seems to me, when you consider the nature of a patent right. that where there is a deliberate intention expressed and about to be carried into execution to infringe certain letters patent under the claim of a right to use the invention patented, the plaintiff is entitled to come to this court to restrain that threatened injury. Of course it must be plain that what is threatened to be done is an infringement. I find that in this case the plaintiff alleges that "the defendant's continue and threaten to continue, and unless restrained by the order and injunction of this honorable court, intend to continue, the use of the said machinery or tools, and the manufacture and sale of screws and screw-drivers in manner aforesaid." \*To that allegation made in the statement of claim the defendant Loe put in this statement of defence, in which he says, "For the reasons more particularly appearing by his counter-claim, the defendant William Clarke Loe claims that he is entitled to use the said machinery and tools, and to manufacture therewith screws and screw-drivers, and he says that it is his intention to do so if and so soon as he is able to perfect the said machinery so that he can manufacture the same at a profit, which so far he has not been able It is quite true that that statement of defence was afterwards amended, but it is not the less a statement which he has put forward of a fact, a statement put forward on the part of the defendant, and I intimated that view to his counsel before he was examined, in order that they might avail themselves of the opportunity of asking him whether he denied that he had ever made such a threat or ever expressed such an intention. They, however, no doubt wisely and prudently, declined to avail themselves of that opportunity, and accordingly it remains without any denial or qualification, or suggestion of denial of any kind than that the instructions came otherwise than from the defendant Loe.

Then, if the threatened act so claimed as of right is proved to constitute an infringement of the plaintiff's patents—and I consider it is proved—that, in my opinion, would be a ground for granting an injunction. But this case does not depend upon that alone; for I think, as regards one part of the case, there can be no question about the infringement—that is, as regards the machine made according to the patent of 1875 by Mr. Jabez James. [His Lordship then reviewed the evidence on this subject.]

The other point raised was a curious one, and by no means free from difficulty, and what occurred with regard to that

was this, that the defendant at various times made screw blanks, as he said, not in all more than 2 lbs., by various contrivances by which no doubt screw blanks were made according to the plaintiff's patent of 1870, as well as that of 1875; they seem to have been an infringement of both. said he did this merely by way of experiment, and no doubt if a man makes things merely by way of bona fide experi-67] ment, and not with the intention of selling and \*making use of the thing so made for the purpose of which a patent has been granted, but with the view of improving upon the invention the subject of the patent, or with the view of seeing whether an improvement can be made or not. that is not an invasion of the exclusive rights granted by the patent. Patent rights were never granted to prevent persons of ingenuity exercising their talents in a fair way. But if there be neither using nor vending of the invention for profit, the mere making for the purpose of experiment, and not for a fraudulent purpose, ought not to be considered within the meaning of the prohibition, and if it were, it is certainly not the subject for an injunction. But, where you see a man using a machine as this defendant has done, under claim of a right to use it, and under that claim of right he makes a quantity of goods, even though a small quantity, I cannot call that an experiment within the meaning of the rule as to experiments. He has made a machine, and, knowing it to be an infringement of patent, he claims the right to make and use it, and his experiment is made to see how his machine works. That is the experiment, as he calls it, putting his machine to work from time to time, and then making screws according to the other patent, and making the screws with the view of trying the screws themselves. It does not appear to me, when I consider the circumstances under which the defendant made these alleged experiments, that I ought to treat this as coming within the rule which prevents mere experiments being subject to the liability of action being brought against those who make them, and to the costs of an injunction being granted against them. this case I consider that the defendant was making the screws in exercise of an alleged right which has been disproved at the trial.

That being my view of the case, I give a verdict for the plaintiff on all points, and grant him an injunction to restrain in the usual way the infringement of either of his letters patent by the defendant. I also order the defendant either to deliver up to the plaintiff or to destroy in his pres-

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ence any machinery in his possession or power, and to pay the costs of the action.

Solicitor for plaintiff: C. H. Edmands.

Solicitors for defendants: H. Kimber & Co.; Faithfull & Owen.

## [9 Chancery Division, 68.]

M.R., March 16, 1878.

\*STANDARD BANK OF BRITISH SOUTH AMERICA V. [68 STOKES.

[1878 S. 106.]

Party wall—Action by Co-owner—Undermining by adjoining Owner—Surveyor—Metropolitan Building Act (18 & 19 Vict. c. 122), s. 88, subss. 7, 11; s. 85, subs. 7.

Although a co-owner of a party wall could not at common law maintain an action against the other co-owner for temporarily undermining the foundation of the wall and replacing it with a new foundation when the work was unattended with danger to the security of the wall, yet, when within the area of the Metropolitan Building Act (18 & 19 Vict. c. 122), such a work being a right in relation to a "party structure" within the meaning of sec. 83, sub-sects. 7, 11, cannot be carried out when a difference arises between the building owner and the adjoining owner (unless they concur in the appointment of one surveyor) except by the award of two surveyors and a third selected by them, or of any two of such surveyors, as provided by sect. 85, sub-sect. 7, of the act.

This was a motion on behalf of the plaintiff company to restrain the defendant, Thomas Stokes, from making or continuing any removal of the soil or support from under, or otherwise weakening or endangering the party wall between the premises of the plaintiff company in Clement's Lane, in the city of London, and the adjoining house and land on the south side of the said lane, in the occupation of the defendant, Thomas Stokes.

The wall in question had been erected at the joint expense of the plaintiff company and the defendant some time previously, and had been held and used by them in common.

It appeared that the defendant was constructing a subbasement beneath his house, and in carrying out his work he had excavated, or begun to excavate, under the said party wall, from which he had commenced cutting away the foundation of concrete and the London clay beneath it, and was substituting for it a new concrete foundation with new brick work carried up beneath the party wall.

On the 26th of September, 1877, the defendant had served on the plaintiff company the usual notice as to party structures under the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), \*naming his surveyor. The plaintiff [69]

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company had also nominated their surveyor, but the two surveyors had not agreed upon the works in question, nor had they nominated a third surveyor as umpire.

The plaintiff company alleged that the defendant had no right to undermine the party wall at all, and adduced evidence to the effect that it was "a risky operation."

The defendant's evidence went to show that with proper

care the work could be safely carried out.

Davey, Q.C., and Buckley, for the plaintiff company: The plaintiff company and the defendant are in the position of tenants in common of the wall in question, and the plaintiff company is entitled to restrain the defendant from making the excavation under the party wall, and from underpinning it. The defendant has no right to do this work without the consent of the plaintiff company, unless by

statutory authority.

In Cubitt v. Porter (') it was held that the common user of a wall separating adjoining lands belonging to different owners was prima facie evidence that the wall belonged to such owners as tenants in common, and although it was there held that the pulling down of such a wall by one of the two tenants in common with the intention of rebuilding the same would not entitle the other to maintain an action of trespass; yet, as the premises to which the present action relates are within the provisions of the Metropolitan Building Act, 1855, the defendant has no right to carry on the work unless the provisions of the act are complied with.

This is a case which clearly comes within the scope of sects. 83 and 85 of the act, and the defendant, being a "building owner" within the definition of sect. 82, and the right to do the work being a right in relation to a party structure within sect. 83, he is bound, a difference having arisen, to comply with the requirements of sect. 85, sub-Here the plaintiff company and the defendant have each appointed a surveyor, but no third surveyor has been appointed as provided by the act.

In the course of the argument on the motion, the surveyors of the two parties having agreed to appoint Mr. Clifton 70] as third \*surveyor, the defendant undertook to execute the works under the direction of the two surveyors, or

of Mr. Clifton in case of difference.

The only remaining question was that of costs, with a view to which counsel were further heard on the questions of law raised in the case.

Marten, Q.C., and Hull, for the defendant: The defend-(1) 8 B. & C., 257.

ant is at liberty to make any sub-basement which he thinks fit under the party wall. He is, in fact, substituting concrete of the best quality for the London clay, and building upon it in such a manner as to make the wall more secure. Whether the parties are owners in severalty or tenants in common of the wall, the defendant is at liberty to use the sub-basement for any purpose he thinks fit, so long as no injury is done to the building. The plaintiff company can claim no right to lateral support from the defendant's basement: Angus v. Dalton ('). The case is not within the provisions as to party structures contained in sects. 83 and 85 of the Metropolitan Building Act, and the defendant has not put himself in the wrong so as to make him liable to pay the costs of the plaintiff company.

Davey, in reply.

JESSEL, M.R.: This matter is now reduced to a question of costs, but it involves, as sometimes a question of costs does, very important points of law; and as, according to my practice, the costs follow upon the legal right, I think it is absolutely necessary for me to decide upon the legal right in order to arrive at a decision as to the liability of

either party to pay the costs.

The plaintiffs allege that they are the owners of a house the party wall. The defendant is the owner of the adwith a party wall. joining house, and there is no dispute about the wall in question being a party wall. The defendant is constructing or attempting to construct a sub-basement—that is, a floor under the basement—and for that purpose he is excavating the earth from beneath his own basement, \*and also from beneath the party wall, and he purposes in doing that to do, or has actually done this, he has cut away the concrete foundation of the wall, and intends to fill up the space occupied by the concrete foundation and by the London clay beneath the wall by a solid foundation of brick, making a new wall below the old wall, which itself in its turn will be supported by a new concrete foundation. The plaintiffs say that the work may be done safely if executed with great care, but that it is a "risky" work, and one likely to lead to danger. The defendant says that he is and will be very careful, and that with care the work will not be dangerous to any one.

Another question arises, whether or not what is proposed to be done is within the provisions of the 83d section of the Building Act. Looking at the position of the parties independently of the Building Act, I have no evidence before

me at the present moment as to the boundaries of the prop-All I have is, that there has been a common user of the wall, which seems to have been erected by the plaintiffs some time back at the common expense of the plaintiffs and the defendant, and I have nothing to show how that wall came to be so used and enjoyed. The question is, what does the law presume from that? I have been referred to an authority which says that, in the absence of any evidence beyond what I have mentioned, there was sufficient for a jury to find that the wall was held by the two parties as tenants in common, and beyond that the case does not go. result therefore is, that according to that authority there is sufficient for me to find, if I think fit, that the wall is held by the plaintiffs and defendant as tenants in common. do not think fit to decide the question, which probably would be the more correct course to take, then I should remit it for further inquiry to see what the boundaries of the two properties were, which could probably be soon ascertained.

But, supposing I were driven to the conclusion that the plaintiffs and defendant were tenants in common, what would their rights be? Now as to that, the very case to which I have been referred enables me to give an answer, and that case is the case of Cubitt v. Porter ('). All the 72] three judges there, and very eminent \*judges they were, were agreed that you cannot have an action by a tenant in common against another tenant in common merely because he pulls down the wall which belongs to them as tenants in common, if it is a temporary thing; "a temporary removal with a view to improve part of the property on one side at least, and perhaps on both." "There is no authority to show that one tenant in common can maintain an action against the other for a temporary removal of the subject-matter of the tenancy in common, the party removing it having at the same time an intention of making a prompt restitution. It was not a destruction. The object of the party was not that there should be no wall there, but that there should be a wall there again as expeditiously as a wall could be made." I read that from the judgment of Mr. Justice Bayley ('). Then Mr. Justice Holroyd says "Taking it to be the law that where there is a comthis('): plete destruction by one tenant in common of that which he has in common with others, so that that other is wholly deprived of the use of it, an action of trespass will lie, I think the act done by the defendant in this case cannot be considered as a destruction of the wall, the removal of the old wall having been effected merely for the purpose of rebuilding another on its site as speedily as possible." Then Mr. Justice Littledale says ('): "If two persons be tenants in common of land on which there is a wall, and one refuses to repair and the other pulls down the wall and sells the materials and builds a better wall, it may be said that there has been a total destruction of the original wall, more especially if he sold the materials. Still, if he did that for the purpose of getting other materials to make the new wall better than the old one was, and he builds the new one, though there was a destruction of that which was originally the subject-matter of the tenancy in common, an action of trespass will not be maintainable;" and then he says, if it is partial damage you must have an action on the case.

The result, therefore, is this: that what the defendant is doing, namely, the removing of the foundation of the old wall, be it for the purpose of putting in as good a foundation or a better one—for he is doing it, as it is stated, by beautiful concrete—it is not a destruction by a tenant in common. All that has been done has \*been done in [73 this case with the bona fide intention of supporting the wall, and will not entitle the other tenant in common to maintain an action, of course still less an injunction. I am not now speaking of a case of danger, which is not, as I understand, the case here. That being so, it appears to me that at common law there would have been no right of action as far as

The next point is, taking away the narrow slip of clay which underlies the wall. Whatever might be the case with agricultural land, I do not think it can be pretended that, where a substratum of clay is used merely for the purpose of supporting a wall, the substitution of brick or burnt clay for the unburnt or native clay as a support of the wall can be deemed destruction or destructive waste. It is an improvement and not a destruction, and I should think, therefore, the removal of a portion of the clay, intending to substitute brick, would not be destructive waste, nor would

it entitle the plaintiffs to an injunction.

The remaining point is a totally different one. The plaintiffs allege, and the defendant denies, that, according to the true construction of the Metropolitan Buildings Act, 1855, whatever the rights at common law might have been, such right no longer exists, and that is the view I take myself of the act. Part III of the act is headed, "Party Structures,"

the wall is concerned.

and chere is this preliminary section (sect. 82): "In the construction of the following provisions relating to party structures, such one of the owners of the premises separated by or adjoining to any party structure as is desirous of executing any work in respect to such party structure shall be called the building owner, and the owner of the other premises shall be called the adjoining owner." Therefore you start by a definition as regards "any work." The next section, the 83d, has this prefix, "Rights of building and adjoining owners." "The building owner shall have the following rights in relation to party structures, that is to say" -does not that mean he is to have no other? Is not that the definition of the rights he is to have, meaning those are all the rights he is to have? In my opinion that is the meaning of the section. The law of the metropolis now defines the rights of a building owner. He is a building owner within the definition of the 82d section, because he wants to \*do some work in respect of a party structure, and, being such a building owner, he has these rights, which, in my opinion, are exclusive, and he has no other rights.

When we come to look at the sub-sections I think that is Sub-sect. 1 gives this right: "A right to make good or repair any party structure that is defective or out Now, as he had a right at law as a tenant in common wherever he was tenant in common to repair or to improve, this sub-section would have no particular meaning, unless read as a limitation of right, because if he has only to give notices under the Building Act when the party structure is defective or out of repair, but may make good or repair it when it is not defective or out of repair without giving any notice, it would have this extraordinary result, that when the wall wanted nothing doing to it he might amuse himself by pulling out the bricks and putting in new ones or handsomer ones, without giving notice to anybody, at his own will and pleasure, whilst, when it was actually out of repair and defective, and wanted something doing to it very speedily, he could not touch it without giving notice. It is obvious that to read the act of Parliament in this way, instead of carrying out the specified intentions of the Legislature, is simply to cast ridicule upon them, and I cannot

consent to do that.

Then sub-sect. 2 gives "A right to pull down and rebuild any party structure that is so far defective or out of repair as to make it necessary or desirable to pull down the same." Here, again, is a limited right to pull down and to rebuild to which the observations on the previous sub-section are

applicable. But as I have read the law from the statements of eminent judges, he has a right to pull down when the wall is neither defective nor out of repair if he only wishes to improve it or put up a better or handsomer one; and consequently it would be again a right to do it with notice when the wall is defective or out of repair, but a right to do it without any notice when it wanted nothing doing to it, but the tenant in common wisheld to improve it or beautify

it, and therefore wanted to pull it down.

Again, sub-sect. 6 specifies this further right: "A right to raise any party structure permitted by this act to be raised, or any external wall built against such party structure, upon condition of \*making good all damage [75] occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof, and of carrying up to the requisite height all flues and chimney stacks belonging to the adjoining owner, on or against such party structure or external wall." The first question that arises upon this sub-section is whether the words "the right to raise any party structure permitted by this act to be raised" are necessarily limited to raising the party structure above ground? I do not see the necessity. If the party structure were all above ground, and you put anything upon it, of course the raising must be above ground, but if the party structure were underground dividing two basements, and did not reach the surface, clearly then the raising would be underground. Is it necessary to limit the word "raise" to putting something on the wall on the top, and may not you raise or make it longer or build it up by something on the bottom? I do not think it is necessary so to hold, and, if it were absolutely impossible to underpin a wall except under this sub-section, my impression is that the sub-section would be wide enough to include it. But it is not necessary to insist upon this, because the 7th sub-section meets the It gives "the right to pull down any party structure that is of insufficient strength for any building intended to be built, and to rebuild the same of sufficient strength for the above purpose upon condition of making good all damage occasioned thereby."

Here, I think, we have a section which, upon the principle of "omne majus continet in se minus," will include the case I have before me. You are going to make a subbasement; you want, therefore, a wall of sufficient strength for the new building, which you intend to have built. For this purpose you may pull down the party structure, which of course would be of insufficient strength—it would fall

down altogether if you took away its support by making the sub-basement—and you must build it of sufficient strength. If you may pull it down and rebuild it, why may you not do something short of that, and underpin it under that sub-section? It would be a very extraordinary reading of the sub-section to say that, although you have the right of pulling it down altogether and putting it up again, yet in rebuilding it you may not do something less, that [76] is to say, support it, and put a new wall \*underneath I think that would be a very narrow view of the sub-Then there is the right to cut into any party structure, a right to cut away a footing, and then by the 11th sub-section there is a right "to perform any other necessary works incident to the connection of party structure with the premises adjoining thereto." Now those are very large words. Why should I not read them to include again the case in question? It is a right to perform any necessary works "incident"—incident to what? Why, "incident to the connection of the party structure." Here, if you make the sub-basement and do not support the wall, it will fall down, and it is incident to its connection, because if it fell down its connection would be terminated in a very summary manner; and I think, therefore, there are words here which are quite large enough to include this right, and my interpretation and decision is, that they are large enough to include them, and therefore that this right is a right within the Building Act when it becomes necessary, or reasonably necessary, to perform it, that the right is not limited to putting bricks upon the top of the wall, and that you may increase the wall by putting bricks below the wall so as to enlarge it in that way as much as you may by putting bricks above the wall to enlarge it in the other way.

I think it the duty of the court to read these acts in a reasonable manner, with a view of carrying out the manifest intention of the Legislature that these party structures should not be interfered with by building owners without due notice to the person or persons other than the building owner interested in the party structure, and without its being referred to the surveyors to decide how the work

should be performed.

This being, in my opinion, within the 83d section, the rules of the 85th section, I think, are clear, though the wording might have been improved. It is quite true that in sub-sect. 7 of the 85th section there is a slight difference in the wording, but I think the fair meaning of the section is this, that where there is a dispute or difference—for the

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words are identical in meaning—the work shall not be done except with the sanction of the other owner who is interested in the wall, or if two surveyors are appointed, one to be nominated by each party, then the two are to choose an umpire, and the work shall be done according to the direction \*of the majority of the surveyors or the umpire, [77 and shall not be done in any other manner. The 7th subsection is this: "In all cases not hereby specially provided for"—this is a case not specially provided for—"where a difference arises between a building owner and adjoining owner in respect of any matter arising under this act, unless both parties concur in the appointment of one surveyor" which they have not done here—"They shall each appoint a surveyor, and the two surveyors so appointed shall select a third surveyor, and such one surveyor or three surveyors, or any two of them, shall settle any matter in dispute between such building and adjoining owner, with power by his or their award to determine the right to do, and the time and manner of doing any work, and generally any other matter arising out of or incidental to such difference." As they have to determine the right to do and the time and manner of doing the work, it would really be reducing the act to an absurdity to suppose that the building owner had a right to proceed with the work until they have so determined. It must mean that they are to determine the time, that is, the work is not to be done until the time is determined, and that, if the work is commenced before that time, the building owner is committing a breach of the act of Par-Then there is a power of appealing, and the appeal may no doubt be delayed for a very considerable time; but if his right is, as I read it to be, a right merely to do that which the surveyor or the umpire may direct shall be done, the building owner has no right to do anything at all until he obtain such directions. The defendant therefore had no right to proceed with his work until the direction of the surveyor had been obtained, and the plaintiffs are entitled to come here to restrain his so proceeding.

The result therefore is, that in my opinion the plaintiffs are right, and the defendant is wrong in law, and the defendant ought to pay the costs. I will order the proceedings in the action to be stayed on the defendant undertaking to do the works in question, under the direction of two surveyors and Mr. Clifton as arbitrator, the further costs to be at

the discretion of the arbitrator.

Solicitors: Flux & Co.; J. Robinson.

See 22 Eng. R., 823 note.

The owner who makes excavations on his land is liable if he thereby deprives that of adjoining proprietors of its lateral support, while it is in its natural condition; but their right to such support does not protect whatever they have placed upon the soil increasing the downward and lateral pressure: Trans. Co. v. Chicago, 99 U. S. R., 635.

Plaintiff, tenant for years, sued for injury to his stock-in-trade, caused by his wall falling from defendant's excavation on an adjoining lot. The wall was over twenty years old, but there had been unity of seizin of both lots for a year, about the middle of the period. Then plaintiff's landlord sold both lots in fee. Held, that no easement had been acquired by lapse of time. Held. also, that there was evidence of negligence in fact, causing damage, and that plaintiff could therefore recover, irrespective of any acquired easement. Held, also, that lateral support in its natural state is a right of property; that right to support for buildings is an easement: and that such an easement was not within the prescription act. Quære, whether, on authority, the landlord, when he conveyed defendant's lot. did by implication of law reserve the right of support to his then existing wall, and the grantee thereby assented to such reservation.

Remarks on the law as to damages, where the land is weighted with buildings: Backus v. Smith, 44 U. C. Q. B., 428.

Where the defendant, in mining coal, passed over the line of his land upon that of the plaintiff, and removed therefrom a quantity of coal left in its natural state as a barrier, and, in consequence of such removal the water from defendant's mine flowed into plaintiff's mine in such quantities as to render further mining of coal impracticable, the plaintiff is entitled to recover substantial damages for the wrongful act of the defendant: Bannon v. Mitchell, 6 Bradwell (Ills.), 17.

The plaintiffs, for the purpose of obtaining ready access to the upper part of their house, constructed a platform, stairway, and landing on the outside of their building, and the defendant, the adjoining owner, on whose land such structures were placed, never took any proceedings against the plaintiffs,

or made any protest against their user of the premises: Held that, after the lapse of ten years, the plaintiffs had acquired not only an easement in the premises, but a title to the land covered by the platform, stairway, and landing; and the fact that during the time plaintiffs were in possession the defendant had, for the purpose of carrying out some works on his own premises, temporarily taken up the platform and removed a portion of the stairway, had not the effect of stopping the running of the statute, the acts referred to not being shown to have been done in assertion of any right on the part of the defendant: Griffith v. Brown, 26 Grant's (U.C.) Chy., 508.

See Farrington v. Bundy, 5 Hun, 617. A court of equity will not enjoin a landowner from making excavations on his land where no serious injury to the adjoining realty is imminent, and where there is nothing peculiar in the situation and circumstances of such realty: McMaugh v. Burke, 12 R. I., 499

The law often permits damage to be done by one person to the property of another without affording the other a legal remedy. Damage and injury must both concur to afford a party a right of action, and the ordinary and legitimate use of one's own land will Therefore not constitute an injury. where defendants owned a town lot on which there had been a house with a cellar underneath it, and the house being destroyed by fire, the cellar was allowed to remain uncovered, and plaintiffs erected a building on the adjoining lot, and sank their foundation walls to a lower depth than defendants' cellar, so that water collecting in the cellar flowed to and against plaintiffs wall and damaged it: held that defend-ants were not liable: Trustees, etc., s. Hutchinson, 2 Pugsley & Burbidge, (New Brunswick), 523.

`See Slater v. Mersereau, 64 N. Y., 138.

One owner of a party wall who has made additions to it for his own convenience is entitled to contribution from the co-owner, who afterwards uses the additions to the extent of one-half the value of the additions at the time they are thus used: Sanders c. Martin, 2 Lea (Tenn.), 213.

A covenant to contribute to the con-

struction of a party wall when he shall use the same, entered into by an owner of land for himself, his heirs and assigns, does not run with the land, and is not enforceable against a subsequent grantee of the land; and this, although his deed is, by its terms, subject to the covenant. Such a stipulation in a deed imposes no personal liability: Scott v. McMillan, 76 N. Y., 141, distinguishing Brown v. Pentz, 1 Abb. Ct. App. Dec., 227, affirming 8 Daly, 320.

In articles of agreement to erect a party wall, it was stipulated that if the lot of A. (then incumbered by trust deed) should be sold under the trust deed before the wall was completed, and if the purchaser should elect to and should finish the wall, the payment (one-half) provided for to be made to A., should be made to the purchaser; held, in an action of covenant, that the covenant was in its nature personal, and did not pass with the land of A. to subsequent owners; also, that, under the facts in this case, A. having procured the completion of the wall could maintain his action on the covenant, although he had parted with his title to the land : Crater v. McCormick, 4 Colorado, 196.

C. and M. were owners of adjacent town lots. They agreed verbally that C., who wished to build on his lot, might put a wall on the common boundary line, and that when M. built on his lot he might use this wall, but must then pay C. half the value thereof; and in 1866 C. built accordingly. In 1867 M. built upon his lot, using the wall erected by C., but, after the completion of his building, conveyed the lot in trust to secure a sum of money then advanced by G. In 1868 C. sold his lot to K., and also assigned his claim against M., for the value of one-half the party wall to K. M. and K. agreed in writing as to the amount of this claim; that K. was entitled to it as assignee of C.; that M. would pay the same in twelve months; and that K. did not, by that agreement, release his claim on the lot of M., the existence and validity of which were recognized. This agreement was not made until the deed in trust had been recorded. After the recording of the agreement, M.'s lot was sold under the deed of trust to money and took the deed of trust, he had no actual knowledge of C.'s claim, but knew that the wall erected by C. was used by M. Held, that G. had the right to presume that M. paid his share of the cost of the wall; and that the agreement between M. and K. being made after the rights of G. had attached under the deed of trust, only operated as a subsequent incumbrance; and H. and Y. having purchased under the senior incumbrance, are entitled to all the rights of the first incumbrancer unaffected by the notice which they had at the time of their purchase: Kells v. Helm, 56 Miss., 700.

Without an agreement between the owners of property allowing them, windows have no proper place in a

party wall.
Whether the erection of fire escapes would be an improper use of a party wall, quære? St. John v. Sweeney, 59 How. Pr., 175.

In a suit by injunction and for general relief by the half owner of a partition wall between building lots in a city against the other half owner, each party owning one of the contiguous lots, to enjoin the placing of windows in a third story about to be built on said wall, by defendant, alleging that the windows would result in irreparable damage, exposing plaintiff's building to fire, giving access to unauthorized persons on his roof, and resulting in consequent depreciation of the value of the plaintiff's property: Held,

1. That it was not necessary to charge a measure of the damage anticipated to give the court jurisdiction.

2. The title and possession of land were so far involved by the character of the action as to give the court jurisdiction. Where a dividing wall is constructed by parties owning adjoining lots, by agreement "to rest equally on the land of each, to be equally used by each for all the purposes of an exterior wall," each party has (1) an easement in the half of the wall on his neighbor's lot, which entitles each to the use of the whole as a party wall; (2) the right to afterwards raise the wall, if it be of sufficient strength, and can be raised without interfering with or injuriously affecting the rights of the other part owner. It follows, that after the construction of a two-story H. and Y. At the time G. advanced the wall under such an agreement, a new

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agreement providing for the right of one of the parties to erect a third story on the party wall, it being of sufficient strength to support it, was without consideration.

If, however, the original agreement under which a party wall is built, resting equally on the ground of each adjacent proprietor, provides for a wall without windows, no right exists in either party to erect another story with window openings on that part of the wall belonging to his neighbor. After an injunction prohibiting the part owner of a dividing wall from using openings or windows in the wall of a third story he was constructing, and providing that the same should be a

dead wall if built, the flat was violated by the insertion of windows. On final trial, judgment being for plaintiff, it was decreed that "the wall shall be and remain a dead wall, without windows or openings of any kind; that the said (defendant) shall wall up with masonry the windows placed in the third story of his said (wall) during the pendency of this suit; and in default of his so doing in thirty days, the sheriff of (the county) shall cause said windows to be walled up, and collect the cost of said (defendant) as under execution." Held, that the above portion of the decree was proper: Danenhauer v. Devine, 51 Tex., 480.

[9 Chancery Division, 78.]

M.R., March 21, 1878.

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\*Brown v. Dale.

[1876 B. 48.]

Voluntary Society—Sale of Society's Property—Right of Members to dispose of Proceeds of Sale.

Upon the sale of land belonging to a company of the nature of a voluntary society, with no rules or provisions as to the disposition of its property:

Held, that the members of the company for the time being were entitled to divide the proceeds in equal shares.

THE question in this case was as to the right of the members of an incorporated company or guild with reference to the proceeds of the sale of certain property belonging to the company.

The Company, Society, or Fellowship of Fullers and Dyers at Newcastle-upon-Tyne had existed for some centuries, and at the time of the sale of the property and at the time of the commencement of the action it consisted of seven members, namely, the plaintiff and the six defendants.

The property in question was taken by the corporation of Newcastle, and the purchase money amounted to £1,750. At a meeting of the company held on the 7th of August, 1875, and convened by circular, it was resolved "that the money, £1,750, be divided equally amongst the members of the company, namely, £250 each."

At the hearing of the action the money was ordered to be paid into court, and inquiries were directed as to the rules of the company, and also as to who were entitled to be ad-

mitted as its members.

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It appeared from the Chief Clerk's certificate that there were no written or printed laws or rules of the company regulating the disposition of the money or the admission of members, but that it had been the custom for the members of the company for the time being, or a majority at any meeting, to exercise unlimited control over the management of the company's property, and that it had been the practice to admit sons of members as of right on attaining twenty-one and becoming freemen of the borough of Newcastle-upon-Tyne.

It further appeared that, at the time of the meeting of the 7th \*of August, 1873, no other persons except the plaintiff and defendants were members or entitled to be admitted members, but that since that time four others had been admitted, and two others had become entitled to be admitted by reason of having attained twenty-one and taken up their freedom, and that twelve others would presumably become entitled—four who had attained twenty-one, on taking up their freedom, and the others, who were under twenty-one, on attaining that age and taking up their freedom.

The question arose, on further consideration, whether the seven members at the date of the resolution were entitled to the whole fund, or whether it should be shared by those who had since become members or would hereafter be pre-

sumably so entitled.

Kekewich, Q.C., and Hornell, for the plaintiff, contended that the seven persons who were actually members of the company at the time when the resolution was carried were

entitled to divide the whole fund.

Lawson, for one of the defendants who, as a steward of the company, represented the interest of the four members who had been admitted since the date of the resolution, and the others who would presumably become members, contended that, instead of the fund being divided, it ought to be invested, and the income divided year by year, as the same accrued, among the several persons who for the time being were members of the company.

Maidlow, and Pope, for the other defendants.

JESSEL, M.R., considered that the fund in question was the property of the members of the company or guild at the time when the resolution was passed, and should be divided between the plaintiff and defendants in equal shares.

Solicitors: Gregory & Co.; Redpath & Holdsworth, agents for S. J. Dale, North Shields.

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### [9 Chancery Division, 709.] M.R., March 28, 1878.

## 80] \*MATTHEW V. NORTHERN ASSURANCE COMPANY.

#### [1877 M. 254.]

Assurance Society-Policy Money-Action by Assignee-Payment into Court under Trustee Relief Act-Costs.

Money payable under a policy by a life assurance society on the death of the assured is not money held upon any trust, and cannot properly be paid into court under the Trustee Relief Act.

On an action by the assignee of a policy against an assurance society, where a difficulty had arisen as to the title to the money, the court being satisfied that the

plaintiff was entitled:

Held, that the company had not discharged themselves by paying the money due on the policy into court, and that they must pay to the plaintiff the amount (which on petition would be ordered to be transferred to them), with interest and costs.

In re Hall (1), In re United Kingdom Assurance Company (\*), and In re Webb's

Policy (8), commented on.

This was an action by the assignee of a policy of assurance against the defendant company, which was a life insurance company incorporated by a special act of Parliament.

In 1863 one Archibald M. Pechi, of Moulmain, effected an assurance on his life with the defendant company for £500, and the company granted to him a policy of insurance, dated the 4th of November, 1863, in the form of a deedpoll, whereby, after providing for the payment of the premiums, it was provided that, if the premiums therein mentioned should be duly paid, "the capital, stock, and funds of the company shall be subject and liable to pay and make good the sum of £500 to Pechi, his heirs, executors, or assignees, within three months after his decease shall have been certified and proved to the satisfaction of the company.

On the 14th of October, 1865, Pechi assigned the policy to Messrs. Grasemann & Co., a firm carrying on business at Moulmain, by the following indorsement thereon: "I assign over to Messrs. Grasemann & Co. the within policy.

(Signed) A. M. Pechi."

In 1869, notice in writing of the assignment and the date 81] and \*purport thereof was give to the defendant company on behalf of the assignees, the receipt of which was acknowledged.

On the 19th of August, 1873, Pechi died.

On the 11th of November, 1873, J. Buchanan, who claimed to be entitled to the policy as the surviving partner of the

(1) 10 W. R., 87.

(\*) 84 Beav., 498.

(\*) Law Rep., 2 Eq., 456.

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firm of Grasemann & Co., and who had paid the premiums thereon to the defendant company, assigned the policy to the plaintiff, and on the 29th of November, 1873, Buchanan's solicitors sent a written notice of such assignment

to the defendant company.

It appeared that shortly after Pechi's death his executors had sent in a claim for the moneys payable under the policy, of which the manager had informed Buchanan before the the last mentioned assignment. On the 2d of December, 1873, the manager wrote to the plaintiff's solicitors, saying that they would not be justified in paying the policy moneys either to Buchanan or the plaintiff without the concurrence of Pechi's legal personal representatives. In reply the plaintiff's solicitors offered an indemnity or further security on payment.

On the 23d of January, 1874, the defendant company paid into court, under the Trustee Relief Act, the sum of £560, being the amount due under the policy for the sum assured and the bonus or profit accrued thereon, to the following credit: "In the matter of the trusts of a sum of £560 secured by a policy of assurance, No. 11,478, effected on the life of A. M. Pechi, since deceased, in the office of the Northern Assurance Company, being money payable into court to the

like credit."

On the 7th of August, 1877, the plaintiff brought his action claiming payment of the sum of £560, with interest thereon at £4 per cent. from the 30th of January, 1874.

The defendant company alleged that, having regard to the form and terms of the assignment of the 14th of October, 1865 (which appeared to be without consideration), and the doubtful legal effect thereof, and the conflicting claims of Pechi's representatives and the plaintiff as the assignee of Buchanan, and all the circumstances of the case, they could not safely pay the moneys either to the said representatives or to the plaintiff without the concurrence of both those parties; and that they had therefore availed themselves of the provisions of the Trustee Relief Act; and they contended that \*by the payment into court of the moneys they [82] were discharged from all liability under the policy. They further alleged that they had no satisfactory evidence that Buchanan was the surviving partner of the firm of Grasemann & Co.

Ince, Q.C., and Buckley, for the plaintiff: The plaintiff, as assignee of the policy, is entitled to payment of the money thereby assured. The defence raised by the defendant company is that they have discharged themselves by

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payment into court, under the Trustee Relief Act, of the amount due under the policy. That defence is not sustainable, as they were not in the position of trustees within the meaning of the act.

[They referred to In re Hall ('); In re Webb's Policy (');

In re Haycok's Policy (\*); Desborough v. Harris (\*).]

Davey, Q.C., and Stevens, for the defendant company: The company in this case is wholly discharged by reason of the payment of the money into court. It appears that there was a question as to the title to the money, the representatives of the assured having sent in a claim, and it not being clear who was properly entitled to the money. Under these circumstances the company were justified in refusing to pay the money until it was clearly established who was entitled to receive it, and they adopted the proper course in paying the money into court. The company were constructive trustees within the meaning of the Trustee Relief Act, the money having been paid into court in the matter of the trusts of the sum of money secured by the policy. They were not in the position of ordinary creditors, as by the form of the policy the stock and funds of the company were "liable to pay and make good" the sum assured. In the case of In re Hall Lord Cranworth considered that money payable under a policy, the right to which was disputed, was properly paid in under the act. The same view was held by Lord Romilly in the case of In re United Kingdom Assurance Company (\*); and again by Vice-Chancellor Wood in the case of 83] In re Webb's Policy. This being so, we \*submit that the defendant company are entitled to their costs of the payment into court, and also to the costs of the action, as the plaintiff had not shown his title when the action was commenced.

JESSEL, M.R.: The first question is, whether the company are wholly discharged, because, as I read these pleadings, the company plead a complete defence to the claim, and this will have some bearing on the question of costs. case must be stated in order to see what the nature of the defence is. It is shortly this:

The company granted a policy of insurance, which, although certainly very much like the ordinary form of policy, is very badly drawn, and I hope after this judicial investigation that the company will see that their policies are better drawn in future. The defendants allege that they have paid into court the money which is due on the policy

<sup>(1) 10</sup> W. R., 37.

<sup>(2)</sup> Law Rep., 2 Eq., 456. (3) 1 Ch. D., 611.

<sup>(4) 5</sup> D. M. G., 439.

<sup>(5) 34</sup> Beav., 498.

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under the act for the relief of trustees, and that that is a discharge.

Now, what is the position of the company under the policy? It is a policy under the seal of the company, signed by three directors and countersigned by the secretary, and is in the form of a deed-poll. It provides that "the capital, stocks, and funds of the said company shall be subject and liable to pay and make good the aforesaid sum of £500 to the assured, his heirs, executors, or assigns, within three calendar months next after the decease of the assured shall have been certified and proved to the reasonable satisfaction of the company." What does that mean? Of course it means that the money shall be paid. It is absurd to read these words in the policy, "subject and liable to pay," as meaning that it is not to be paid. It must be considered that the stock of the company shall be applied in payment of the amount due on the policy, or that they shall pay it out of the stock.

I have no doubt that no such contention as that raised here would have been raised if the action had been brought at common law before the passing of the Judicature Act. Nothing could be more fatal to the interests of this company than to hold that they are mere trustees who have executed an equitable assignment of their stock in favor of every policy holder. How they could deal with their assets, or carry on their business, if that was the effect \*of the [84 policy, I am utterly at a loss to understand. I decide that it is meant to be an ordinary policy of insurance, and that it is, in fact, a covenant to pay so far as the capital and

stock of the company will extend. That being so, what is the position of the company? Why, the company is the debtor, and the assignee, or legal personal representatives of the assured, is the creditor; and I should have thought, but for some authorities which have been cited, that that point was too plain for argument, but this case shows that what is too plain for argument to one mind is not too plain for argument to another mind, and that after argument a case may be decided in a different way by one judge from what it would be decided by another Therefore, with the modesty which ought to be felt by one judge in speaking of the decision of other judges, I may be allowed to say that I am speaking of the impression on my own mind, and therefore I say it is not clear to my mind, although I decide the other way, that other judges are wrong. But I am happy to say on looking over the authorities that they are not all one way.

There is a case decided by Lord Cranworth while Lord Chancellor, Desborough v. Harris (1), where he treated the company, who had granted an ordinary policy of insurance, as a debtor, and the person entitled to receive the purchasemoney as a creditor, and discussed their rights on that footing throughout; so that the view I take is sanctioned by very high authority. Nor do I find, when I come to examine the authorities closely, that a different view is taken of the

position of the parties.

In the case of In re Hall (\*) Lord Hatherley, then Vice-Chancellor, incorrectly, in my opinion, apprehended the effect of a policy of insurance. In that case an insurance company had paid in a sum of money under the Trustee Relief Act, and the Vice-Chancellor says that "it had been held that a mere stakeholder could pay in a fund under the Trustee Relief Act, and therefore the company were justified in so doing." He does not mention the authority where it had been so held; but even if that were so, a debtor is not in the position of a mere stakeholder, even where the creditor has dealt with the debt so as to make two claims to it. \*He may interplead, and in that sense, and in that way, and to that extent, may be described incorrectly as a stakeholder; but that is a peculiar case, and an ordinary debtor cannot be considered a stakeholder. But when I come to look at the case of In re Hall (\*) I find it was not an ordinary policy; it was a family policy, and it seems to have been thought that there was something peculiar or special about the case.

The matter came before Lord Romilly in the case of In re United Kingdom Life Assurance Company (\*). What happened there has happened, according to my experience, very often. An eminent Queen's counsel, now Lord Justice Baggallay, and Mr. Everitt, were counsel for the petitioners, and Mr. Caldecott, who was counsel for the respondents, the Aldersons, who brought in a claim; he took the point that they were not liable to pay the costs because the Trustee Relief Act did not apply. It was not the company who took the objection; it was not the trustees who took the objection, but he took the objection to avoid the payment of costs, so that he was not in a very favorable position. Mr. Wickens, for the insurance company, as to the right to pay in under the Trustee Act cited In re Hall. Then the Master of the Rolls said (\*) "that he concurred with Vice-

<sup>(1) 5</sup> D. M. & G., 439.

<sup>(3) 10</sup> W. R., 87.

<sup>(\*) 34</sup> Beav., 493.

<sup>(4) 84</sup> Beav., 494.

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Chancellor Wood that mere stakeholders might pay money into court under the Trustee Relief Act, though they might not, strictly speaking, be termed trustees. He ordered the costs of the company of and relating to the payment into court, and of this application, as between solicitor and client, and the costs of the petitioners, to be paid by the respondents, the Aldersons." So that he agreed that they were not trustees. He said they were mere stakeholders, and he concurred with Vice-Chancellor Wood. He did not really, as far as I can see, give a judicial judgment on the matter. It is a case in which he was not very anxious to decide favorably to the objecting party, and he ordered the respondents to pay the costs, which they ought to have paid No doubt it might have required a bill to in any event. make them pay them. That is all he decided. As I understand, he thought they were not strictly trustees, but that the act applied to a mere stakeholder though not a trustee.

\*Then when the matter came before Vice-Chancellor Wood in the case of In re Webb's Policy ('), it came in this way: there were some very important questions to be argued out between the parties. They did not object at all; it was principally desired to take the opinion of the court, they all took the benefit of the payment into court, they did not object to pay the costs of the company, but they did object to pay the costs as between solicitor and client, and that is how the question came to be decided. Mr. Wickens, for the Assurance Company, argued "that the company were entitled to costs as between solicitor and client. In an interpleader suit no doubt the plaintiff was entitled to costs only as between party and party, but the intention of the framers of the Trustee Act (10 & 11 Vict. c. 96, s. 1) was not to substitute a proceeding for an interpleader suit. It was rather to substitute a proceeding for a suit to administer a trust and to relieve persons who held moneys belonging to others in their hands;" and he cited In re United Kingdom Life Assurance Company (\*). There Vice-Chancellor Wood observed, "I think the question was argued before me, and decided in a case of In re Hall (')." The argument on the other side was that the company were stakeholders, and were to have their costs as between party and party. Vice-Chancellor consulted the Master of the Rolls, the Master of the Rolls having relied upon him in In re Hall, and what he says is this ('): "I observe that in the case of In re United Kingdom Assurance Company, where the Master

<sup>(1)</sup> Law Rep., 2 Eq., 456.

<sup>(2) 84</sup> Beav., 493.

<sup>(2) 10</sup> W. R., 87. (4) Law Rep., 2 Eq., 458, 459.

of the Rolls had to determine upon the propriety of payment into court by an insurance company of the proceeds of a policy, his Lordship decided that a stakeholder of this description came within the designation in the act of 'trustees, executors, administrators, or other persons having in their hands any moneys belonging to any trust;' and he appears to have given the company their costs as between solicitor and client without any argument." Then, after saying that the Master of the Rolls agreed with him, he goes on: "The object of the act was to relieve not only trustees, executors, and administrators, but other persons having trust moneys in their hands, and to enable them to obtain a cheap and efficacious mode of having the rights \*of the parties settled. It is in every way desirable that this form of proceeding should be encouraged rather than otherwise." He does not decide they are trustees although they have trust moneys, but he says, "the Master of the Rolls has decided that it was desirable to encourage this form of proceeding," and that is all. I may say neither judge, in fact, said there was a trust. The case arises on a very plain act of Parliament, and it appears to me that it is a case of an ordinary debtor, not a stakeholder, for a debtor cannot, except in a very limited sense, be called a stakeholder, although he can file a bill of interpleader where the creditor has so dealt with the debt that he cannot find out whose debt it is, and in that sense he is sometimes called a stakeholder.

That being the position of matters, I have only to look at the act of Parliament. I must say that the act of Parliament is, to my mind, very plain indeed. The "trustees, executors, administrators, or other persons having in their hands any moneys belonging to any trust whatsoever," are, after describing the instruments creating the trusts, to pay into court to the credit of the trust. Therefore it must be moneys subject to some trust. That is what they are to do, and they are to pay it into court "in the matter of the particular trust" (describing the trust by the names of the parties). What trust is it that these people are to describe, or under which they are to pay in? It is well to see from the affidavit of the trustees what it was.

It is in the matter of the trusts of a sum of money secured by a policy. What trust was created by the policy? I asked the counsel for the defendant to tell me what the trusts were, if there were any. There is no trust at all. It is simply to pay to the assured, his heirs, executors, or assigns. It is not within the act at all. That answers the M.R.

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question at once. There is no trust declared of it, and what the act means is very plain; it is constructive trusts. The words are "trustees, executors, administrators, or other persons having any moneys belonging to any trust," and they apply to persons holding moneys subject to a trust, and not knowing what to do with them, and there is no question whether they can be called trustees. It does not appear to me that there is any trust declared of this insurance policy, or any trust to which the act could apply. That being so, I decide, "by no means disagreeing with [88 the view entertained by Lord Romilly, although probably disagreeing with the view expressed by Vice-Chancellor Wood, that these defendants were not trustees, and certainly not trustees under the instrument with which we have to deal.

I now come to the next point. It is said, and said with truth, that there were all sorts of difficulties raised, and that the defendants might, if they thought fit, have said, "We will not pay you unless you prove your title;" but if they had done that, they must have paid the costs. If a debtor says to his creditor, "I am not satisfied with your title, you have a title derived through a course of time, some parts are of doubtful construction, some of doubtful authenticity, I require you to prove your case," the creditor may say, "I will bring an action and prove my case," but the debtor is liable to pay the costs.

It is a very useful practice for the creditor to show his title to the debtor before bringing his action. What I am about to say is not intended to encourage people to bring actions on policies of insurance without adopting that course, but I say if they had adopted that course in this case, and the company had not been satisfied, and the plaintiff brought an action, the plaintiff would, in my opinion, have obtained his costs as a matter of course. No argument, in my opinion, can be founded on the fact that there were difficulties

as to title.

Then I come to the next point. The creditor delayed a long time after giving notice to pay before bringing action. Here, again, I must consider what the company did. If the defendant company had come and offered to pay the money, and stayed the action, I am not prepared to say that I should, as a matter of course, have given the plaintiff his costs. It is not for the court to encourage vexatious litigation. But the company paid the money into court under the Trustee Relief Act, and disputed the plaintiff's right to succeed in the action. I am not only not satisfied that they 25 Eng. Rep.

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were right in paying it into court, but I think the act did not apply. His Lordship then commented on the facts of the case, and said that the duty of the company was to have written to the executors giving them notice of the assignment, and asking them if they disputed it, and telling them that if they did they must take the consequences. Lordship \*continued:] I think the company had no sufficient justification for not taking the proper steps to ascertain whether there was a dispute or not, instead of paying the money into court under the Trustee Relief Act. It follows from what I have said that the company must pay the amount with interest, and the costs of the action. If a petition is put into the paper for the purpose of obtaining an order for the fund to be transferred to the company I will make the order.

There will be judgment for £560, with interest at £4 per cent. from the 30th of January, 1874.

Solicitors: W. W. Wynne; Lyne & Holman.

[9 Chancery Division, 89.] M.R., April 17, 1878.

#### Beddow v. Beddow.

[1878 B. 56.]

Practice—Injunction—Jurisdiction of High Court—Common Law Procedure Act, 1854, ss. 79, 81, 82-Judicature Act, 1873, s. 25, subs. 8-Arbitration-Unfitness of Ar-

The extensive jurisdiction of granting injunctions originally given to the common law courts by the Common Law Procedure Act, 1854, ss. 79, 81, and 82, is now vested, by virtue of the Judicature Act, 1873, in the High Court of Justice. All acts, therefore, which a common law court, or a court of equity only, could formerly restrain by injunction, can now be restrained by the High Court.

The jurisdiction of granting injunctions thus vested in the High Court is practically unlimited, and can be exercised by any judge of the High Court in any case in which it is right or just to do so, having regard to settled legal reasons or principles.

The court will restrain an arbitrator by injunction from acting, in any case in

which he is, in the opinion of the court, unfit or incompetent to act,

This was a motion by the plaintiffs, the executors of a testator, William Beddow, deceased, for an injunction to restrain the defendant, Samuel Hipkins, from acting as referee or arbitrator under the provisions of an agreement dated the 26th of April, 1877, and made between the plaintiffs of the one part, and the defendant, John Beddow, of the other part.

\*The defendant, J. Beddow, and the testator had been in partnership as brick-manufacturers, and upon the testator's death the defendant Beddow, in March, 1877, agreed

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with the plaintiffs to purchase the testator's share in the business upon a valuation to be made by the defendant Hipkins on behalf of the plaintiffs, and by one Blades, on behalf of the defendant Beddow. That valuation was accordingly made, but notice having been given prior to the testator's death by the London and North Western Railway Company to take part of the brickyard upon which the partnership business had been carried on, that part of the brickyard was expressly excluded from the valuation.

The agreement in question, of the 26th of April, 1877, was then entered into, by which it was provided that the amount which should be received from the railway company as compensation for taking any part of the brickyard should be apportioned between the plaintiffs and the defendant, J. Beddow, according to the arbitration of Hipkins and Blades, with an ultimate reference to an umpire in case of disagree-

ment.

On the 10th of August, 1877, J. Beddow attended at the office of the plaintiffs' solicitor to pay the balance due from him to the plaintiffs on the original valuation, and paid the whole in cash except £197, for which he offered trade acceptances to that amount. The plaintiffs, however, refused to take the acceptances, whereupon Hipkins, who was present, offered to give his check for the amount, he taking the acceptances in exchange. The plaintiffs assented to this offer, and accordingly took Hipkins' check for £197, which was made payable to J. Beddow's order and indorsed by him. It was, at the same time, arranged that the plaintiffs should not present the check for twenty one days, in order to give Hipkins time to get the bills paid or discounted.

After the expiration of the twenty-one days, Hipkins' check was presented for payment at his bankers' but was dishonored, and the amount of it was afterwards paid to the

plaintiffs by J. Beddow himself.

Hipkins had, immediately upon receiving the acceptances, discounted them, but he failed to apply the proceeds in meeting the dishonored check. Hipkins having, under these circumstances, become indebted to J. Beddow for the amount of the check, an \*agreement was entered into between [91 them by which a boat and certain castings were accepted by Beddow in part payment of the debt, and the balance was to be paid by Hipkins in monthly instalments of £2 each. The amount of the debt now remaining due was £178 15s. 3d., secured by Hipkins' promissory note.

The plaintiffs, considering that Hipkins had placed himself in such a position with regard to the defendant Beddow Beddow v. Beddow.

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as that he would not in all probability exercise his duties as their arbitrator with impartiality, requested the defendant Beddow to substitute a new arbitrator. He, however, insisted on Hipkins acting as the plaintiffs' arbitrator, whereupon the plaintiffs brought the present action for Hipkins' removal, and for leave to substitute a new arbitrator or referee in his place; and they now moved in the terms above mentioned.

Chitty, Q.C., and Warmington, for the plaintiffs.

Millar, for the defendant Beddow: The court has no jurisdiction to remove an arbitrator except on the ground of corrupt conduct. The mere fact that the arbitrator is indebted to one of the parties does not render him incompetent to act so as to give the court jurisdiction to remove him: Morgan v. Morgan ('); Drew v. Drew ('); Russell on Arbitration (\*). I admit an arbitrator may be removed on the ground of corruption, Malmesburg Railway Company v. Budd ('); but there is no such case made here.
W. S. Owen, for Hipkins, expressed his willingness to

retire, if both parties consented to his doing so.

JESSEL, M.R.: This case no doubt raises an important question, though as often happens, the pecuniary interests involved are comparatively small. The first question is, what is the jurisdiction of the court in general? It is to be remembered that the jurisdiction of the Court of Chancery to grant injunctions was formerly limited; it \*was limited by the practice of different chancellors. The jurisdiction was never extended in modern times beyond what was warranted by the authorities; and in course of time various vexatious and inconvenient restrictions were adont-The granting of an injunction was always looked upon as an extraordinary exercise of jurisdiction, but it is not so One of the most useful functions of a court of justice is to restrain wrongful acts; and a power of this kind was given to the common law courts in the largest terms by the Common Law Procedure Act, 1854, s. 79. That section says, "In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may, in like case and manner as hereinbefore provided with respect to mandamus"—there is no limit beyond this, that the section only applies to a common law action—"claim a writ of injunction against the repetition or continuance of such breach of contract, or other injury, or the committal of any breach of contract or injury

<sup>(1) 1</sup> Dowl., 611. (2) H. L., March 8, 1855.

<sup>) 4</sup>th ed., p. 103. (4) 2 Ch. D., 113.

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of a like kind, arising out of the same contract or relating

to the same property or right."

And the 81st section says that "In such action judgment may be given that the writ of injunction do or do not issue, as justice may require;" that is to say, as to the judge may seem right according to law. That is confirmed by the 82d section, which provides that it shall be lawful for the plaintiff at any time after the commencement of the action to apply ex parte to the court or a judge to restrain the defendant from the repetition, continuance, or committal of any wrongful act; and that such writ may be granted or denied by the court or judge upon such terms "as to such court or judge shall seem reasonable and just." What is reasonable and just is the only limit. No doubt the Court of Chancery was not originally limited by any other terms; but the instances in which an injunction might be granted were decided by that court, and there were certain well known cases in which it was settled that the court ought not to grant an injunction. All that is covered by the Common Law Procedure Act, even in those cases.

That being so, when we come to the Judicature Act, 1873, we find this: First, all jurisdiction whatever which was exercised by any of these courts is transferred to the new court. Next, all acts \*of Parliament applying to any one of [93 the old courts apply to the High Court of Justice, which consequently has jurisdiction to grant injunctions whenever

it may seem just.

Now I rely upon those provisions, because they seem to me to explain the 25th section (sub-sect. 8) of the Judicature Act, 1873, which says, "A madamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient." If this can be done by interlocutory application à fortiori it can be done at the trial of the action, on the principle of "omne majus continet in se minus." Next, by the Common Law Procedure Act this power would have been exercised at the trial as far as it was The only addition is that in the Judicature Act you have "just or convenient": not that that would be convenient which was unjust; but that in ascertaining what is "just" you must have regard to what is convenient. acts, therefore, which a common law court or a court of equity only could formerly restrain by injunction, can now be restrained by the High Court.

That being so, it appears to me that the only limit to my

power of granting an injunction is whether I can properly do so. For that is what it amounts to. In my opinion, having regard to these two acts of Parliament, I have unlimited power to grant an injunction in any case where it would be right or just to do so: and what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles.

What, then, is the complaint in this case? It is this. An arbitrator nominated by the plaintiffs becomes unfit for his office by reason of personal misconduct. Ought the court to decide that it has not power to interfere in a case of this kind? It is a settled principle that no inferior tribunal, whether it be a judge, an arbitrator, or other judicial or quasi-judicial person, ought to be allowed to proceed in the hearing of a case which such judge or arbitrator is, for any special reason, unfit or incompetent to hear.

Now, one of the well known grounds of incompetence is personal interest. If in the course of the arbitration it is discovered by one of the parties, to whom it was at first un-94] known, that the arbitrator \*has a large interest in the subject-matter of the award, it is not necessary to wait for the award and then take proceedings to set it aside, but the party may come to have the arbitrator removed.

Again, if personal unfitness has arisen from infamy—an expression well known to the common law—that is, perjury or fraud—it is clear that a man will be unsuitable to exercise judicial or quasi-judicial functions. Could it be tolerated that in a civilized country there should be no remedy for a case like that? Under such circumstances there must be some means of getting rid of an arbitrator.

Then, of course, personal misconduct less than that which has just been suggested would suffice. A man may have so conducted himself that, even in the absence of a legal conviction, he would be obviously unfit for the exercise of such functions. It is clearly the duty of the court to interfere in such a case. The only question is whether the arbitrator has so acted in this case that he is unfit to proceed with the arbitration. There are very few facts, and they are undisputed. [His Lordship stated the facts as above, and continued:]

It is said that this man ought to be allowed to remain arbitrator after the plaintiffs have objected to him and requested that he should not act. I must say that I think he is not a fit person to undertake the duties of arbitrator, that it is not probable that he will faithfully and honestly disV.C.M.

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charge his duty, and I shall therefore grant an injunction in the terms of the notice of motion.

The costs will be costs in the cause.

Solicitors: G. S. Warmington; E. Flux & Leadbitter, agents for J. F. Crump, Walsall; Harper, Broad & Batt-cock, agents for W. T. Travis, West Bromwich.

[9 Chancery Division, 95.] V.C.M., June 26, 1878.

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[1875 B. 81a.]

Will-Absolute Interest-Consumable Articles-Farming Implements-" Not accountable for Depreciation."

A testator gave to his widow his personal estate, including his farming implements and stock, live and dead, for her life, and declared that she should not be liable to account for any diminution or depreciation in the farming implements and stock, and after her decease he gave the residue of his personal estate to his children:

Held, that the widow took an absolute interest in the farming implements and

John W. Breton, of Hailsham, Sussex, by his will, dated the 4th of November, 1873, appointed his wife, Emma Breton, executrix, and bequeathed all his personal estate (including all his farming implements and stock, live and dead) unto her for her life, and declared that she should be unimpeachable for waste, and should not be liable to account for any diminution or depreciation in the said farming implements and stock, alive and dead, and after her decease he bequeathed the rest, residue, and remainder of his personal estate upon trust for his children.

The question arose whether Mrs. Breton took an absolute interest in the farming stock and implements, so as to be

entitled to the proceeds thereof on a sale.

J. Pearson, Q.C., and Hume, for the widow, relied on Randall v. Russell (') and Phillips v. Beal (') as showing

that consumable articles could not be given over.

Whitehorne, for the infant children: The provision as to depreciation cannot give Mrs. Breton the absolute interest. It is decided that where a business and stock-in-trade is given for life, the stock-in-trade though perishable does not go absolutely to the donee: Cockayne v. Harrison (\*).

[Malins, V.C.: No doubt, if the testator had given his widow the farming stock and implements without saying that she was \*not to be liable for depreciation, then, if [96]

(1) 8 Mer., 190. (\*) 82 Beav., 25. (\*) Law Rep., 18 Eq., 482; 2 Eng. R., 877.

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there had been a sale of the articles, she could only take the income of the proceeds. I

J. Pearson, in reply, was stopped by the court.

Malins, V.C.: This gift must be construed as the gift of an absolute interest. Mrs. Breton might allow every animal on the farm to die, and every implement to wear out, and is under no obligation to repair or replace any loss or wear The executors would have no right to interfere or to ask her whether she had sold or given away anything forming part of the live stock or implements. This must be equivalent to an absolute gift of those articles which ipso usu consumuntur. The real intention of the will is that the widow is to use the farming stock for her life, but she is not a mere tenant for life, but when the articles get worn she may get rid of them. There is no obligation for her to carry on the farm as there was in Cockayne v. Harrison ('), and I decide accordingly that the children take no interest in the farming stock and implements.

Solicitors: Dawes & Sons.

(1) Law Rep., 13 Eq., 432; 2 Eng. Rep., 377.

See 18 Eng. Rep., 792 note; 18 Eng. Rep., 728 note; 2 Wms. on Executors (6th Am. ed.), 1392 et seq., bottom p.; 8 Greenl. Cruise, Real Prop., 322, top

paging.
Where it is the manifest intent of the testator to sever the product from its source, a bequest of the income of an estate will not carry an absolute estate in the principal: Bentley v. Kauffman,

86 Penn. St. R., 99.

A will devising the use and enjoyment of certain real estate to A., "to be enjoyed by her during her natural life only," and, after her death, to her heirs "free and clear of all liens and incumbrances thereon," gives her only a life estate, the intent of the testator being to create a new stock of descent at her death: Slemmer v. Crampton, 50 Iowa, 302.

A remainder may be limited upon a bequest of money, as well as of other personal property, and the testator may confide the money to a legatee for life, trusting to such legatee to preserve the fund for the benefit of the remainderman; in which case the legatee for life becomes trustee of the principal during the continuance of the life estate: Smith v. Van Ostrand, 64 N.Y. 278, reversing 3 Hun, 450, 5 Thomp. & Cooke, 664, and distinguishing Patter-

son v. Ellis, 11 Wend., 259, and Tyson v. Blake, 22 N. Y., 558.

The will of S. bequeathed to his wife the sum of \$1,650, in lieu of dower, for her support during her natural life, or so long as she should remain his widow; then "her said dower" to be transferred to testator's three children, fifty dollars of said sum to be paid to the widow as soon as practicable after the testator's decease, and the residue in about six months thereafter: Held, that the bequest gave to the widow of S. the use of the \$1,650 during her life or widowhood, with power to apply so much of the principal as might be necessary for her support, but with no further power of disposition; and subject to the exercise of this power, gave a remainder in the principal to the children; that this remainder was not repugnant to the prior gift, and was valid; and that upon the death of the widow, the children were entitled to so much of the fund as remained undisposed of, for her support: Smith v. Van Ostrand, 64 N. Y., 278, reversing 3 Hun, 450, 5 Thomp. & Cooke, 664, and distinguishing Patterson v. Ellis, 11 Wend., 278; Bell v. Warn, 6 Thomp. & Cooke, 601. See 13 Eng. Rep., 830 note.

Upon the death of S., his widow received from the executors the money bequeathed, and with it bought United States bonds, which she held at the time of her death: Held, that the children of S., not his executors, were entitled to the bonds, and were the proper parties to bring an action for their conversion; that the executors having paid over the money as required by the will, were discharged from all liability and divested of all power concerning it: Smith v. Van Ostrand, 64 N. Y., 278, reversing 8 Hun, 450, 5 Thomp. & C., 664, and distinguishing Tyson v. Blake.

22 N. Y., 558.

See 13 Eng. R., 830 note.

M. by his will devised the net income arising from his real estate to his mother during her life, and upon her death directed his executors to sell all his real estate with the exception of one piece, and out of the proceeds to pay his sister J. \$20,000, and the residue to his sister A. The mother died during the lifetime of the testator. The testator died, leaving plaintiff (his brother) and the two sisters his only heirs. After his death the executor received the rent of the real estate. Plaintiff claimed one-third thereof and asked for an accounting. Held, that the will gave the executor no title to the real estate, or right to receive the rents and profits, but as the sale was directed to be made immediately after the death of the mother, and the direction was absolute, by this power the land was equitably converted into money, and would be so regarded, and that the entire proceeds belonged to the sisters: Moncrief v. Ross, 50 N. Y., 431, distinguishing Germond v. Jones, 2 Hill, 569, 1 Sandf. Ch., 148.

The will of M. directed that his residuary estate should be divided equally among his children; the shares of the daughters "to be secured to them for their separate use during their nat-ural lives," and in case of one dying without issue, so much of her portion "as may remain at the time of her \*\* death" to revert to the surviving children, etc., subject to the right of each daughter to dispose of one-half of her share by will. By another clause he devised his real estate to his executors in trust, to sell and to apply the proceeds as directed in the will. By a clause in a codicil, stated therein to

have been intended to make clear any obscurity as to the title of the children, M. gave to each of his children an equal portion, to each of his sons a portion absolutely, to each of his daughters an estate for life; remainder to her lawful issue, subject to her right to dispose of one-half by will, and subject to the power in trust in the executors to sell and convey; and in case of the death of a daughter without issue, such portion of her share as she had not disposed of by will, to go to her brothers and sisters.

In an action to construe the will and codicil; held (Church, C. J., and Miller, J., dissenting) that it was the testator's intention that the corpus of each daughter's share should be kept entire, and she could not, during her lifetime, use up any portion thereof, but was simply entitled to the income; that the power given to each daughter to dispose of a moiety by will did not enlarge her estate during her life; but that no trust was created in the executors; and that a daughter was entitled to have her share paid over to her, upon giving adequate security that the corpus of said share will be kept so that at her death it may pass to those then entitled: Livingston v. Murray, 68 N. Y., 485, modifying 4 Hun, 619. Where an estate for life is devised

and a power of disposition is annexed, the fee does not thereby pass; but it is otherwise where the estate is devised generally with a power of disposition annexed.

A testator, having given his wife the use of all his real and personal estate for life, declared as follows: "I also give and bequeath to my beloved wife L. A. one-third of all that may remain at the time of her death for to dispose of as she may see proper:" Held, that the widow took a vested, absolute estate in such third part: Borden v. Downey, 35 N. J. Law, 74, affirmed 36 id., 460.

A gift of a fund, with limitation over in the contingency of the legatee's dying without leaving lawful issue, entitles the legatee to possession of the fund: Hennion v. Jacobus, 27 N. J. Eq., 28.

The interest of remaindermen in personal property which is consumed by use is limited to such as is left at the death of the tenant for life: Ballentine v. Spear, 2 Baxter (Tenn.), 269.

25 Eng. Rep.

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Where a testator ordered his execu tors to pay, at his son's death, to the children of his son, if the latter should leave any children, a sum of money, the executors were ordered to invest the money, and to pay the interest during the life of the son to the residuary legatees: Woodward v. Dunster, 27 N. J. Eq., 84.

A bequest of a sum of money generally, without distinguishing it from testator's other moneys, or mentioning out of what fund it is to be paid, is a general legacy. A designation of such bequest in the residuary clause as "specific" legacy will not change its character as general, where the term is evidently used by the testator with reference to the fact that it was a leg-

acy of a specified sum of money.

Though as a general rule the gift of the interest of a fund, standing by itself, is a gift of the corpus, yet if from the context of the will it appears that the interest only was intended for the legatee, the gift of the interest will

not pass the principal.

A gift of \$50,000 to A., "the interest thereof to be paid to her during life," and the principal to her children at her decease, does not pass the corpus of the fund to A.

As between the tenant for life and the remainderman, the rule, at least as to funds that are not permanent, is, that what is not specifically given is to be converted into money, if the property and the parties are not abroad. In this case the testator has directed the conversion.

Where there is a bequest of the income of a sum of money to one for life and then the principal to another without any trustee being named in the will other than the executor, he will be held to be trustee: Parker v. Moore, 25 N.

J. Eq., 228.

A devise of the use and income of a sum of money to a person during life, and upon his death without issue the principal to revert to the estate of the testator, gives to the devisee only the right to the interest of the money during his life: Matter of Fetterhoff, 1 Pearson (Pa.), 238, distinguishing Re-walt v. Ulrich, 23 Penn. St. R., 388.

Under a will containing the following clause: "All the rest, residue and remainder of my estate, real, personal or mixed, of whatever name or nature, I devise and bequeath to A. for his comfort, support, and maintenance during his natural life, and at the decease of A., whatever of said estate remains unexpended by him, then I give and bequeath the same to B." A. takes an estate for life, with a power to sell and convey in fee if necessary for his support and maintenance; and the remainder over is contingent on its not becoming necessary to exercise that power: Johnson v. Battelle, 125 Mass., 453.

A, being seised of lands by indenture, "in consideration of natural love and affection, and for the better mainte-nance of the grantees, conveyed the premises by the words 'give, grant, alien, enfeoff and confirm' to his daughter H., and B. her husband, to the use of H. for life, with power to her to sell the same in fee at any time if she choose to any person by deed or will, and the money arising from such sale to keep for her own use and maintenance, and in case the said H. should not sell the premises, then after her death he, the said A., conveyed the same to B., the son-in-law, for life, and after his death to the heirs of the body of H., and his, her, or their heirs and assigns forever, equally to be divided between them, share and share alike." B. and H. took possession, and afterwards, for the consideration of five shillings by lease and release, conveyed the premises to C. in fee, in trust that he should reconvey the same premises to B. in fee; and C. being so seised, by virtue of such lease and release, on the next day for the consideration of ten shillings reconveyed the premises to B., who afterwards made his will devising the premises to D. for thirty-one years, and died. H. died without issue, and A. afterwards died leaving four sons and four daughters his heirs-at-law. In an action brought by the heirs-at-law against a tenant under D., it was held that H. took an estate for life, with a vested remainder in tail; that the words "heirs of the body," etc., were words of limitation and not of purchase, notwithstanding the words added "and to his, her or their heirs and assigns," etc., which were to be rejected as repugnant to the estate created by the preceding words, and that the power to H. was intended for her benefit, and was well executed, and the estate vested in B.

and those claiming under him: Brant v. Gelston, 2 Johns. Cas., 384.

Where a testator made a bequest to his wife of all his estate, real and personal, "to have and to hold during her life, and to do with as she sees proper before her death," the wife took a life estate in the property, with only such power as a life tenant can have, and her conveyance of the real property passed no greater interest: Brant v.

Virginia, etc., 93 U. S., 326.

A testatrix, by her will, devised and bequeathed all the rest, residue and remainder of her estate "unto my beloved husband, Thomas Scott, but such part thereof as he may have at the time of his decease, I give, devise and bequeath unto my niece Mary Louise Ledyard, and my nephew Guy Carlton Ledyard:" Held, that the husband took an estate for life in the property described in the will, with power to sell and dispose of the same so far as necessary to secure to himself the full beneficial enjoyment thereof, and that the nephew and niece were entitled to what might remain undisposed of by him at the time of his death: Colt v. Heard, 10 Hun, 189.

Defendant's testator, by his will, devised to his wife and two youngest children all his personal property, and the use of a farm until June 29, 1890, and directed his executor, within two years from that date, to sell the farm and divide the proceeds among certain persons named in the will: (1), that the widow and children took an estate for years in the farm, and that the remainder therein vested in the residuary devisees named in the will, subject to the execution of the power of sale; (2), that the power vested in the executor, being a mere naked power of sale, did not suspend the power of alienation, and was valid.

The will provided that "the personal property and use of said farm to be under the exclusive control and management of my wife, without interference by any person whatever." Held, that a valid power in trust was v. Blanchard, 4 Hun, 287, affirmed 70 N. Y., 615, and limiting Beekman v. Bonsor, 28 N. Y., 298.

Testator devised a freehold estate to his wife for her life, and then directed that she should dispose of the same amongst the testator's children by her, at her decease, as she should think proper. The wife made no disposition of the estate. The children take no interest in the estate under the will: Crossling v. Crossling, 2 Cox's Chy.,

Devise to A., the testator's wife, for life, then B. at her disposal, provided it be to any of his children, gives an estate for life, with a power to dispose of the fee. And where such devisee, with an after taken husband, did, by lease and release, and fine, convey the premises to a trustee and his heirs, to the use of the wife for life, without impeachment of waste; remainder to her daughter by her first husband, and the heirs of her body, remainder to the son by her first husband and his heirs; this was adjudged a good execution of the power: Tomlinson v. Dighton, 1 Peere Williams, 149.

A testator devised a messuage to his wife for her life, she keeping the same in repair, and after her death to his brothers and sisters; and gave her, in case she shall stand in need, full power to sell all his estate, real as well as personal, for her comfortable support: Held, that the wife took only a life estate, with a power to sell depending on a contingency. It is incumbent on those claiming under the wife to show that the power was well executed, and that the contingency has happened; and whether the contingency has happened is a question for the jury. Evidence that the wife, who was also executrix, paid the debts of the testator, has no tendency to prove that she was in need; whether an account settled in the probate court is the only admissible evidence to prove such payment, quære? Stevens v. Winship, 1 Pick., 818.

A power to sell land can only be exercised in the manner and for the precise purpose declared and intended by the donor; when the purpose becomes wholly unattainable the power ceases; and this is so, although the purpose is defeated by the voluntary act of the person for whose benefit the power was created: Hetzel v. Barber, 69 N. Y., 1.

Testatrix gives certain property, real

and personal, to her husband for his life, with authority to use the same as he pleases in every respect. She then says:

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At the death of my husband or before, if he chooses to relinquish his rights, I give all the land and other property to one or more of the children of R., as he may designate or authorize, should it be necessary; him to make such other diposition of the same as he may deem proper, having full confidence in him that he will do what is right. R. was the daughter of the husband by a former wife. The husband died in the

lifetime of the testatrix.

Held, 1. The provision in favor of the children of R. is void for uncer-

tainty.

2. The testatrix did not dispose of the remainder in the property after the life estate given to the husband; but authorized the husband to dispose of it. And as he died in her lifetime, the property was not disposed of by her will, but passed to her heirs and next of kin: Robinson v. Allen, 11 Gratt.

(Va.), 785.

A testator gave the residue of his estate to his executors, in trust to pay the net income to his wife "so long as she shall remain my widow and my children shall be under age, to be used and applied by her to the maintenance, support and education of my children who may be under age, but without being called upon to give any account of the manner in which she may have applied it, as it is my wish that she shall have the absolute control of its use and disposition so long as she shall remain my widow." Held, that this did not create a sub-trust in the wife, but was only an expression of confidence in her as to the use and disposi-The income was tion of the income. to be paid to her without legal responsibility for its use and disposition, with absolute control, and without being called to give any account of her application of it. The wife could not be called to account unless she should be guilty of malversation: Biddle's Appeal, 80 Penn. St. R., 258.

J. devised and bequeathed all her estate to her daughter C., with power to convey; the income to be expended for the support of H., a lunatic, during life, and then the principal to belong to C. C. sold certain premises of which the testator died seised, and conveyed by deed, reciting substan-tially the provisions of the will, re-ceiving a bond and mortgage for the

purchase-money, the principal payable C. received the after the death of H. interest annually for many years, and applied it to the support of H.; she then assigned the bond and mortgage as collateral security for the note of her husband. In an action by the committee of H. to protect her interest in the bond and mortgage, held, that as it appeared clear that the parties acquiesced in and acted upon the theory that the will created a trust in C. for the benefit of H., no other construction could be given to it; and the assignee could neither question this construction, or the legality of the trust; that C., save for purposes connected with the trust, could only assign her interest in the securities, i.e., her right to the principal—and the assignee received them subject to the rights of the cestus que trust: Reid v. Sprague, 72 N. Y., 457.

Where testator gives the net income of a share of the residue of his estate to a son absolutely, but not the principal, disposing of the latter in case the son die without having received it, leaving issue, and making the payment of the principal to the son entirely discretionary with the executor, such share does not vest in the son so as to be transmissible in case of the decease of the son without having received it.

Such share, in case of the son's death without issue, does not fall into the residue, but is undisposed of. Though the rule is, that a general residuary bequest carries lapsed and void legacies, it is one of the exceptions that it does not include any part of the residue it-

self, which fails: Garthwaite v. Lewis, 25 N. J. Eq., 351.

In New York it is provided by statute (1 R. S. 733, § 81, 1 Edm. St., 683), that "where an absolute power of disposition, not accompanied by any trust, whell he given by the owner of a parshall be given by the owner of a particular estate, for life or for years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts.

If the first devisee has the power, by the terms of the will, to dispose of the property, he must be considered the absolute owner, and any limitation over

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is void for repugnancy: Rona v. Meier, 47 Iowa, 607.

Where A. devises all his real and persone A. devises all his real and persone at the to his wife, and in case

Where A. devises all his real and personal estate to his wife, and in case of her death without giving, &c., by will, or otherwise selling or assigning the said estate, then he devisee the same to his daughter D., the wife takes the entire fee simple, both by force of the word estate and of the absolute power given by the will, and the subsequent limitation being repugnant thereto, either as a remainder (which cannot be limited on a fee), or as an executory devise, to the validity of which it is esential that it cannot be defeated by any act of the first taker, the same rules apply whether the limitation is of real or personal property; in either case it is void.

Where there is a devise for life in express terms, a power of disposal annexed does not enlarge it to a fee; but where, to a general devise without any specification of the quantity of interest, an absolute power of disposal is annexed, the devisee takes a fee: Jackson

v. Robins, 16 Johns., 537.

A will contained the following clause: 'After payment of my just debts and funeral expenses, I give and devise to my wife one-third of all my real estate to her sole use and behoof forever, together with all the furniture or personal property now in the house; and the other two-thirds I leave in her power, and bequeath to her for her support during her lifetime, and leaving it as an injunction on her to divide it among the children, at her death, as she deems best, and as they deserve." The personal estate was insufficient to pay the debts and funeral expenses, and the administrator with the will annexed sold the real estate, and had a sum remaining in his hands after paying such debts and expenses. Held that the wife took an estate in fee in one-third of the residue; that, as to the other two-thirds, she took at least an estate for life, with a power to convey the fee and to receive the proceeds; that she was entitled to the residue of the proceeds in the administrator's hands and to use them at her discretion, for her support: and that no trust was created by the will in favor of the children: Gibbins v. Shephard, 125 Mass., 541.

A testator devised all his residuary estate to his executors, and directed them to convert the same into money, and pay over one half to H. T. Carr, a son; and the other half to a trustee in his will named, who was directed to invest the principal, and pay over the interest to his son William E. Carr, for his use and benefit; the testator declared the property so placed in the charge of the trustee, to be the share of his said son William in his estate, and that it was to be held for his benefit "during his natural life, when he may dispose of the same by will at his pleasure."

William E. Carr having died intestate, held, that he took the absolute estate in the one-half devised to his trustee subject to the trust, and not

merely a life estate therein.

That upon his death intestate, his administrator was entitled to recover the same from the trustee: Fox v. Carr,

16 Hun, 566.

A bequest of \$10,000 to a daughter to be held by testator's executors in trust for her, the interest to be paid to her annually, and if she should marry and have a child or children, then after her death the \$10,000 to go to such child or children, passes the funds to her executors, subject to her disposition of it by will upon her death without issue.

The gift of the produce of a fund without limit as to time, passes the

fund itself.

Where there is a gift to children or other legatees, the shares being given absolutely in the first instance, followed by a direction to settle the shares upon trusts which do not exhaust the whole interest, the legatees take their shares absolutely, subject to the qualifying trusts.

And where the testator provides that the portion of his daughters shall be held in trust by his executors or other persons appointed for the purpose, during the life of the daughters, and go to their children or issue if any they have at their decease, this is regarded as a qualification or limitation of the estate of such daughters only as leave children or issue, and will not affect the vested or transmissible character of the shares of such daughters as die without leaving children or issue.

The fact of a settlement by testator in such case to use of a daughter, from he control of any husband she might have, is no evidence that the testator intended that she should have a life estate only: Gulick v. Gulick, 25 N. J. Eq., 824, affirmed 27 N. J. Eq., 498.

An absolute power of disposal in the first taker, renders a subsequent limi-

tation repugnant and void.

Thus, where the testator, after making sundry bequests, proceeds as follows: "And as to the residue of my estate, after payment of my just debts, I give and bequeath the same to my beloved wife . . . and lastly, I further direct if there be any of my said estate left after the decease of my said wife, then the said property left to be equally divided between G. and T." Held, that the residue of his estate, after the payment of his just debts and legacies, vested absolutely in his wife: Jones v. Bacon, 68 Maine, 34; S. C., 28 Am.

A gift of the income of a fund without limitation as to time, is a gift in perpetuity, and carries the fund itself. Where there is no bequest over, and

no restriction to the life of the first Where it taker, the gift is absolute. is plain that the intention of a testator was to give the entire beneficial interest of a bequest to his nephew, the fact that he withheld the enjoyment of the principal thereof until the trustee of the nephew should be satisfied that he was sober and industrious in his habits, in nowise affects the question of intention.

A testator bequeathed a certain sum to his executrix in trust, to be safely invested, and the income to be paid to his nephew, and authorizing her, at her discretion, to pay over to him the fund itself: Held that this was a vested legacy in the nephew: Millard's Ap-

peal, 87 Penn. St. R., 457.

In one clause of his will, the testator bequeathes to M. L., a married woman, living with her husband, a specified sum of money. In a subsequent clause, it is provided that if M. L. shall die leaving no child of her own, that the money shall be equally divided between the testator's living children, the issue of his own body. Upon final settlement of the estate, the executor had sufficient funds to pay all the legacies, but refused to pay M. L., claiming the right to hold the amount during her life to be placed at interest for her

benefit. Assuming that the limitation over to the living children of the testator in the event that M. L. shall die leaving no child of her own, is valid and not void, as being inconsistent with the first clause; held 1. That as the bequest over is upon uncertain contingencies that may never happen, namely, the death of M. L. leaving no child of her own with living children of the testator surviving her, the children of the testator, if they take at all, do so by way of executory devise and not as legatees in remainder. 2. M. L. takes the bequest absolutely, and is entitled to the possession thereof. Her estate, if the limitation over is valid, is liable to be divested by the happening of the contingencies named, and no estate or interest vests in the possible legatees over until such contingencies happen. 3. Upon final settlement of the estate before the death of M. L., and in the absence of any provisions of the will making it the duty of the executor to hold and manage said legacy, she is entitled to receive the same. 4. If such limitation over is valid, the children of the testator and not the executor, in the absence of a trust reposed in him, are the proper parties to an action or proceeding to protect their contingent in terest, if any necessity for such an action arises: Lapham v. Martin, 33 Ohio St., 99.

A. bequeathed a sum of money for the purchase of a house and lot for the use and benefit of his wife and children "during the period she remains my widow, and after her death the same shall descend to my heirs according to law;" and in a subsequent part of his will referred to the above bequest, providing that "such life estate in said house directed to be purchased and the annual interest aforesaid to be in lieu of dower." Held, that the widow took an estate in such house and lot durante viduitate, under the rule that " a clearly expressed intention in one portion shall not yield to a doubtful construction in another portion of the same instrument.

That in Pennsylvania, an estate in realty durants viduitate can be created without a limitation over upon the marriage of the widow, aliter as to personalty.

That upon the widow's marriage the land descended to and became vested

in the heirs at law qua heirs; as devisees they would only take upon the widow's death: In the matter of Fox, 1 Pearson (Penn.), 437.

A devise of an express estate for life with general power of disposition-" without restriction, and without being accountable for the same "-whatever might be its construction, if uncontrolled by statutory provisions, is, by the express words of the statute (Rev. Code, § 1595), enlarged into an absolute estate in fee, only in favor of creditors and purchasers, and future interests limited thereon are preserved; and although the statute speaks only of lands, the same rule of construction must be applied to both real and personal property when given by the same words and in the same clause of the will: Alford v. Alford, 56 Ala., 850.

Testator first gives to his wife all his estate real and personal during her life, and then says, if she should marry again she shall continue to enjoy the possession and income of his estate, but neither she nor her husband shall have power to sell or dispose of any part of it, but the whole shall be kept entire until her death for the uses afterwards mentioned; but if he should die possessed of any property conveyed to him by his wife as heiress of her father, it was not to be considered as his property, "but remain unto her and at her sole disposal, at which also should be all his household furniture, family utensils, horses, carriage, plate, plated ware, &c." Then comes the following clause: "and I do further give and bequeath unto her, to be disposed of at her death, one thousand pounds, to be raised out of my property in such man-ner as she shall direct, giving preference to the sale of personal estate." He afterwards gives to his adopted son (on condition of changing his name), after the death of his wife, "all his estate real and personal, excepting the above sum of one thousand pounds and what should afterwards be excepted."

Held, that the one thousand pounds was not an absolute legacy to the wife, and she having died without exercising the power of appointment, it did not pass to her personal representative: Flintham's Appeal, 11 Serg. & R., 16.

Where the income of all a testator's property was given to his wife for life, with a gift over of the principal at her death; held that the premium received by her on certain gold coin, belonging to testator's estate, was part of the corpus, and not income, to which she as life tenant was entitled: Van Blarcom v. Weiss, 31 N. J. Eq., 783, and see cases cited in note.

A trust deed of real and personal estate directed and empowered the trustees to take possession of the real estate, manage, let, demise, repair, insure, mortgage and sell the same; and to receive, audit and settle all claims and demands as to the real estate, and as to the personal estate and the income of the same, making such compromises or allowances as to the same as they may think just; and to invest and keep invested the proceeds of any real estate and also the personal estate; and to apply the net rents, issues and profits of all the trust property to the use of the grantor of the trust for life, and upon her death to convey the whole trust property according to the provisions of the trust deed, which disposed of the remainder in every possible contingency. A part of the principal of the trust property consisted of a bond for \$7,500, secured by a second mortgage; the first mortgage was foreclosed and nothing was realized on the second mortgage; and the bondsmen being insolvent, an action was commenced by the trustees against the sole devisee and legatee of the investor of the seven thousand five hundred dollars. This action was compromised, and the whole seven thousand five hundred dollars and interest obtained; the trustees paid their attorney in that action five hundred dollars.

One of the trustees claimed that the five hundred dollars should be deducted from the income, and in accounting for the income to the life tenant, deducted the amount and refused to pay Thereupon the other trustees and the life tenant commenced this action against the refusing trustee, to compel him to unite with the plaintiff trustee in paying to the plaintiff life tenant four hundred and forty-nine dollars and sixty-three cents (being the proportion of the five hundred dollars which plaintiff claimed to be chargeable to principal), and to have that sum charged to principal as a necessary payment for its rescue and preservation.

Held that, under the terms and scope

of the trust deed, the whole of the five hundred dollars was charges ble on and to be paid out of the income; that the equitable doctrine of apportionment had no application; that the trust deed contained the law governing the action of the trustees; that it was their plain duty to pay the five hundred dollars out of the income; and consequently that the complaint stated no cause of action for the relief demanded: Burleigh v. Center, 41 N. Y. Sup. Ct. R., 441.

The will of W. devised and bequeathed his residuary estate to his executors to convert into money, and after paying debts, etc., to pay the re-mainder to his children, in equal shares; to his sons, their respective shares when they became of age, or thereafter, in such sums as the executors should deem best; and in case the whole principal should not be paid to them, or either of them, during their lives, then the residue to be "equally divided among and paid to the persons entitled thereto as their or either of their next of kin, according to the laws of the state of New York, and as if the same was personal property, and they or either of them had died intestate." By another clause, it was provided that if any of the children should die without issue, his or her share should go to the survivors. One of the sons died before his share had been fully paid, leaving a widow and one child.

In an action for an interpretation of the will, held (Miller, J., dissenting), that the widow was not entitled to any portion of the residue, but that the whole thereof belonged to the child: Murdock v. Ward, 67 N. Y., 887, reversing 8 Hun, 9, and distinguishing Merchants, etc., v. Hinman, 15 How. Pr., 182, Knickerbocker v. Seymour, 46 Barb., 198, and Dewey v. Goodenough, 56 id., 54.

One W. devised all his personal estate to three trustees, of whom his widow was one, in trust to call in and convert the securities into money, and when received to invest the same as they should think best, and pay the interest and produce thereof to his widow during her life, for the maintenance of herself and his children. The widow, after the testator's death, remained on his farm and in possession of the stock and personal property.

some of which she sold, and the stock had been added to by breeding. A writ of execution came into the sheriff's hands against her, and while it was there the two other trustees took from her a mortgage of all the personal property for advances made by them to her. The sheriff afterwards seized under the writ, and the two trustees forbade the sale, but it went on, and one of them bought the goods, and took a bill of sale from the sheriff, against whom they then brought an action for the seizure.

Held, that they were not estopped by having purchased at the sale, but that having taken the mortgage from the widow while the writ was in the sheriff's hands, they could not allege that the goods were not then hers, and therefore that they could not recover. Held, also, that the increase of the

Held, also, that the increase of the stock must be subject to the same rule as the stock.

Semble, that the property was liable in the widow's hands to the execution, which for all that appeared might have been for a debt contracted for the support of herself and family: Peers v. Carrall, 19 Upp. Can. Q. B., 229.

See Brigham v. Bush, 33 Barb., 596.

See Brigham v. Bush, 33 Barb., 596. A voluntary trust of personal property to a trustee, "in trust for herself and children," being a trust for a mother and her children, is not to be regarded, in its construction, in the same manner as a trust to a trustee for his or her benefit and that of strangers, but the simple and plain meaning of the author of the trust is to be considered by the court.

Irrespective of the fact, that (as was suggested in the case) there may be beneficiaries of the trust—children of the trustee—who are not now in case. This trust—to Lavinia Duly for the benefit of herself and children—must be construed to be a transfer of a fund to the mother, to be expended for her benefit and that of her children.

If the mother should misapply the fund, or refuse reasonably to appropriate it to the supply of the wants of her children as well as her own, a court of equity would interfere, without hesitation, the moment such a showing is made. But there is no intimation of this nature in the petition: Duly v. Duly, 8 West. Law Monthly, 42.

A testator bequeathed to his wife all

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his property "in trust for my children, and at her death to revert to the sole use of my children in equal proportions."

Held, that the wife and children were entitled equally to the income during her life, and that at her death the children would be equally entitled to the corpus of the estate. The wife having, since testator's death in 1854, been in receipt of all the income and thereout maintained the children, paying portions of corpus to some who had attained their majority, keeping accounts which were never objected to by the children, all of whom at the date of the suit were of age, accounts were nevertheless directed of what each was entitled to, and of what had been expended in the maintenance of each: Stevenson v. McIntyre, 5 Victorian L. R. (Eq.), 142.

The court said (p. 146), "The earlier words of the will, then, I think, would leave the beneficial interest to the children only, reducing the widow to a mere trustee. But then we have the words 'at her death,' reducing her estate to a life estate. 'To revert,' etc., these words properly mean 'to come back to a previous state.' But here there are only two states, during her life, and after her death, so that 'revert' must mean 'change' only. But it means so that matters after, are to be different from matters before, her death: and the direction after death being for the sole use of the children,

indicates that the trust was for somebody jointly with the children, and, I think, that somebody means herself, (the trustee), and I see no reason to say that it should be otherwise than equally with the children."

If a trustee under a will is therein authorized to sell real estate on such terms, and in such manner, and at such time or times as he may think most advisable, the court will not control his direction in these respects, in the absence of evidence that he is likely to abuse his trust by an arbitrary or capricious exercise of authority: Proctor v. Heyer, 122 Mass., 525.

Where a mother received a life estate in her father's property, which was, after his death, sold, under directions of the will, by the chancery court, for partition, and she purchased a specific part of the land, to the extent of her interest, no money actually being paid, it is held, that though she may afterwards sell the same to a third party, who has notice of the proceedings by virtue of the chancery court records, upon the death of the mother, the children, who are entitled to the interest in remainder, may recover the same from such purchaser: Swan v. Finney, 4 Baxter (Tenn.), 26.

Permanent improvements, such as necessary repairs, etc., will be charged to the tenant for life when made during the life estate: Ballentine v. Spear,

2 Baxter (Tenn.), 269.

[9 Chancery Division, 96.] V.C.M., July 24, 1878.

# PARNALL V. PARNALL.

[1876 P. 131.]

#### Will—Absolute Interest—Precatory Trust.

A testator gave his wife the whole of his real and personal property for her sole use and benefit, and continued, "It is my wish that whatever property my wife might possess at her death be equally divided between my children":

Held, that this was not a gift coupled with a trust, and that the widow took an

absolute interest in the property.

EDWIN PARNALL, of Exeter, in his will, dated the 23d of November, 1871, made the following divise and bequest:—

"I give and bequeath to my wife Ann Parnall, after the payment \*of my just debts, the whole of my real and [97 personal property for her sole use and benefit. It is my 25 Eng. Rep. 101

wish that whatever property my wife might possess at her death be equally divided between my children."

The widow claimed to be absolutely entitled to the property, and the question came on to be decided on demurrer whether the property was affected with a trust for the benefit of the children.

J. Pearson, Q.C., and Byrne, for the widow, cited Attorney-General v. Hall('); Lechmere v. Lavie('); Bland v. Bland (\*); Wynne v. Hawkins (\*); Perry v. Merritt (\*); Cowman v. Harrison (\*); as showing that where there is no certainty of the subject of the gift there can be no gift over.

Glasse, Q.C., and Campbell, for the children, cited Horwood v. West('); Le Marchant v. Le Marchant('); Foley This is a case where, if the wife elects to take v. *Parry* (\*). the property, she does so on condition of leaving what remains to her at her death to the children, as in Willis v.

Kymer (").

Malins, V.C.: In this case there is no precatory trust, for there is not a definite gift over as there was in Le Marchant v. Le Marchant, and there is no obligation here for the widow to possess anything at her death. In order to create a trust which can be carried into execution there must be a definite subject-matter. Here the widow has a right to spend the whole of the property, and so there can This is the principle on which all be no trust affecting it. the cases cited from Attorney-General v. Hall to Comman v. Harrison proceed. The case of Horwood v. West, cited by the other side, is really in accordance with the other cases, for there the testator's widow was, in the opinion of the court, bound to give all that the testator left her to the children after her decease. In Breton v. Mockett ("), lately \*decided by me, I held that where consumable articles were given to a widow for life, but without any obligation to keep them in repair, and so that she should not account for depreciation, there could be no gift over, but she took the absolute interest. So here I decide that the children take no interest, and the demurrer must be allowed.

Solicitors for all parties: Clarke, Woodcock & Ryland.

- (1) Fitzgib., 314. (2) 2 My. & K., 197. (3) 2 Cox, 849 (4) 1 Bro. C. C., 179.
- (5) Law Rep., 18 Eq., 152; 9 Eng. R., 702.
- (\*) 10 Hare, 234.
- (\*) 1 S. & S., 387. (\*) Law Rep., 18 Eq., 414. (\*) 5 Sim., 138; 2 My. & K., 188.
- (<sup>ìo</sup>) 7 Ch. D., 181; 23 Eng. R., 492. (11) Ante, p. 95.

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[9 Chancery Division, 98.] V.C.M., June 29, 1878. LAWES V. LAWES. [1876 L. 185.]

Partnership Accounts-Variation of Articles-Money Interests not altered.

By articles of partnership it was agreed that the settlement of accounts should be made half-yearly, at Lady Day and Michaelmas, and that on the death of a partner his share of the assets should be taken at the amount settled by the last half-yearly account preceding his death. By a subsequent parol agreement it was arranged that the account should be settled once a year only, viz., at Michaelmas:

Held, that this variation in the partnership articles did not affect the money in-

terests of the partners; and that upon the death of a partner in the month of May the accounts must be settled up to the previous 25th of March.

This was an adjourned summons on the part of the plaintiff, the representative of Thomas Lawes, the testator, that the defendants, Thomas Lawes and J. E. Randell, the surviving partners of the testator, might be ordered to take the partnership accounts up to the 25th of March, 1876, last preceding the death of the testator, which took place on the

20th of May, 1876.

The testator, Thomas Lawes, and J. E. Randell and the defendant Thomas Lawes, entered into partnership in March, 1872, and partnership articles were then executed by them. The 28th of such articles provided that the partners should within one week from the 25th of March and the 29th of September in each year adjust all the accounts of the partnership, and make a rest or settlement of the same, to be signed and agreed to by the several partners in manner therein prescribed. And by the 31st article \*it was provided that in case the retirement or death of any partner should occur after the 29th of September then next (1872), that his share and interest in the partnership should be taken at the amount or sum which according to the then last half-yearly rest taken or to be taken should appear to have represented his share with interest and additions therein provided for; and by the same deed it was agreed that the partnership should be deemed to have commenced on the 30th of September, 1871.

The first settlement of accounts between the partners was made up to the 29th of September, 1872, but after that it was agreed between them that it would be more convenient to have such settlement made up on the 29th of September only in every year, and accordingly the rests or settlements were made up year by year to the 29th of September, 1875.

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Thomas Lawes, sen., who was the father of Thomas Lawes the defendant, died on the 20th of May, 1876, and a suit was instituted for the administration of his estate.

A question was now raised as to how the interest of Thomas Lawes the elder in the business was to be ascertained. The surviving partners, J. E. Randell and Thomas Lawes the younger, contending that the interest of the deceased partner was to be taken at the sum appearing in the balance sheet taken up to the 29th day of September, 1875, previous to his death, with interest and additions provided to be added thereto by the deed of partnership; and the plaintiff in the suit for the administration of Thomas Lawes' (the deceased) estate, contending that the estate was entitled to a share of the profits up to the 25th of March last preceding his death; or up to the 20th of May when he died, on the ground that no balance sheet was taken up to the said 25th of March.

Higgins, Q.C., and C. Browne, for the representatives of the deceased partner: The articles of partnership are binding upon the partners, and though for convenience they might have agreed to take the accounts only once a year, that did not affect their interest in the share of the profits secured by the articles. There is no evidence of anything but a parol agreement, and that is not sufficient to alter 100] \*the strict terms of the partnership deed. The clause as to taking the half-yearly rests must either be acted upon strictly or struck out altogether, and if struck out, then the parties will be put upon their common law rights, and will be entitled to share in the profits up to the day of the death of a partner.

Glasse, Q.C., and Alexander and Colt, for the surviving partners: The claim made by the plaintiffs to share in the profits of the business up to the 20th of May, 1876, the day of the death of Thomas Lawes the elder, cannot be supported, for their testator's estate cannot be entitled, in any view of the case, to share in profits made after the 25th of March, 1876; but we submit that the executors are only entitled to the amount of their testator's share as appearing by the balance sheet taken on the 29th of September, 1875.

It is clear that any provision or clause in a deed of partnership may be varied with the consent of all the partners, and there is evidence here to show that all the partners agreed that their accounts should be taken, not half-yearly, but once a year only—on the 29th of September. It is stated in Mr. Justice Lindley's book ('): "Any article, however express, is capable of being abandoned by the consent of all

the partners; and this consent may be evidenced not only by express words but by conduct." This principle was acted on by Lord Eldon in Jackson v. Sedgwick ('), where the partners had agreed that annual accounts should be taken, and that in case of the death of a partner his representatives should be paid an allowance instead of profits. The same principle guided the decisions in Pettyt v. Janeson (') and Simmons v. Leonard (').

Higgins, in reply.

MALINS, V.C.: If the argument on behalf of the surviving partners is correct, then the share of the testator who died in May, 1876, would have to be ascertained as of the 29th of September, 1875, because that \*was the last [10] rest or settlement of the partnership accounts; and although there might have been much larger profits made during the eight months from September to May, still the deceased partner's estate would only be entitled to the third part of the profits realized up to September, which appears to have amounted to £1,500. But if, on the other hand, the contention of the plaintiffs is right, then they would be entitled to a third of the profits up to the 25th of March previous to the death of Thomas Lawes the elder. It is contended for the surviving partners that the articles of partnership were varied by the mutual agreement of the partners to the effect that the rests or settlements of account were to be taken once a year only, that is, at Michaelmas, and that consequently the articles must be read as if they contained a clause for taking the accounts only once a year; but it appears to me that although, for convenience, it was agreed that the settlements should be made but once a year, still it never suggested itself to the mind of any of the partners that the effect of that alteration in the mode of taking the rests might be to deprive a partner dying eight months after the last settlement, of his fair share of the profits for the last half year. The argument goes to this, that if the deceased partner had died on the 27th of September he would then be deprived of his share of the profits for a whole year, and would be thrown back upon his share of the £1,500. am bound to come to the conclusion that before a man agrees to vary a contract which should have such an effect as this, it must be clearly shown that his intention was not only that the accounts should be taken yearly, but that his money interest should be ascertained only once a year. I am satisfied that there never was any such intention, and that the matter rests on a principle which is beyond doubt.

<sup>(1) 1</sup> Sw., 460.

<sup>(</sup>º) 6 Madd., 146.

<sup>(8) 3</sup> Hare, 581.

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Now, therefore, I think the case of the defendants fails in this material respect, that there is nothing to show that Thomas Lawes the elder, or either of the other partners, intended to do anything to vary their financial arrangement or to alter their interests as defined by the partnership articles. If the articles are binding altogether, then the accounts must be taken half-yearly, and as the partners agreed to take half-yearly accounts, that which they agreed to do must be considered as done, and the continuing part-102] ners \*must have their accounts taken and a settlement made up to the 25th of March last preceding the day of the testator's death.

If the effect of the communications between the parties was to supersede the strict terms of the articles, then I agree that the clause would be superseded altogether, and that could not be done by a parol agreement; but if the clause were omitted, then it would be like an ordinary partnership, and the accounts would have to be taken up to the death of the partner.

I think the rights of the partners are clear, and that the accounts must be taken under the terms of the articles of partnership up to the 25th of March, which was the last half year of the partnership before the death of Thomas Lawes the elder.

Glasse, Q.C.: The parties have arranged, in consideration of the decision of the court being in favor of the plaintiff's contention, that it will be more convenient to have the settlement of accounts up to the death of the deceased partner, and as the case raised a proper question for argument, it has been arranged that the costs of both parties should come out of the estate.

Malins, V.C.: That is a very proper arrangement. Therefore let it be declared that the partnership accounts ought to be taken up to the 25th of March preceding the death of the deceased partner, but by consent let them be taken up to the 20th of May, 1876; and let the costs of all parties be paid out of the estate.

Solicitors for plaintiff: Surr, Gribble & Bunton.
Solicitors for defendants: Blake & Snow; Turner & Son.

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[9 Chancery Division, 103.] V.C.M., July 6, 18, 1878. \*Besley v. Besley.

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Lessor and Lessee-Error in Terms of Lease-Claim for Compensation-Rule of Caveat Emptor.

By a contract in 1861, A. agreed to grant an underlease to B. of certain premises, for the residue of the term held by A., except the last ten days, such underlease to contain similar clauses and covenants to those contained in the original lease. In pursuance of this contract an underlease was prepared by the lessor's solicitor for twenty-three years less ten days, and the lease was executed by the lessee, who neither inspected the original lease nor employed any professional adviser. In 1877 it was discovered that the original lease had only sixteen years to run, and the underlease had, by mistake, been made for seven years longer than the lessor had power to grant. The lessee claimed compensation:

Held, that the lessee was to blame in not inspecting the original lease and ascer-

taining for himself the precise term, and that caveat emptor applied.

This action was for the administration of the estate of Alderman Besley, in which a claim was made by Sir Charles Reed and the representatives of Benjamin Fox, deceased,

under the following circumstances:

By an agreement dated the 16th of July, 1861, Alderman Besley agreed to sell, and Sir Charles Reed and B. Fox agreed to purchase the business of a type founder, then carried on by Alderman Besley in Fann Street, in the city of London, together with the stock-in-trade, for the sum of £10,000; and it was agreed, amongst other things, that an underlease should be granted by Besley to Reed & Fox of the premises in Fann Street, then occupied by Alderman Besley, from the 1st of January then next for the residue of the term for which Alderman Besley held the same, except the last ten days thereof, at the yearly rent of £225, such lease to contain similar clauses and covenants to those contained in the lease under which the said R. Besley held the premises, and Charles Reed and Benjamin Fox should execute a counterpart of such underlease without requiring any evidence in support of the title of R. Besley, and that R. Besley would procure to be granted to C. Reed and B. Fox a lease of the premises in the Vine Yard, then occupied by him at the existing rent.

\*By an indenture of underlease dated the 1st of January, 1862, R. Besley demised the Fann Street premises to C. Reed and B. Fox for a term of twenty-three years less ten days from the 25th of December, 1861, at an annual rent of £225 per annum; and the said underlease contained a Beeley v. Besley.

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covenant by R. Besley that C. Reed and B. Fox, their executors or administrators, paying the rent and performing the covenants contained therein, should and lawfully might peaceably and quietly have, hold, use, occupy, possess, and enjoy all and singular the said premises thereby demised, with their and every of their appurtenances during the term thereby granted without any lawful let, suit, trouble, hindrance, or interruption whatsoever, from or by the said R. Besley, his executors, administrators, or assigns, or any other person or persons claiming or to claim, by, from, or under him, them, or any of them.

At the time of the execution of such underlease R. Beslev held a lease of the premises comprised therein for a term of sixteen years only, and expiring at Christmas, 1877. Consequently the lease granted by Besley to Reed & Fox exceeded by seven years the term which he had power to This was admitted to have been a mistake mutual to both parties, and was not done intentionally. The underlease was prepared by R. Besley's solicitors, and no

solicitor was employed by C. Reed and B. Fox.

After the death of R. Besley a notice was sent by his solicitor to C. Reed (his partner, B. Fox, having previously died), informing him of the mistake in the underlease, that the superior landlord required possession, and requiring him to give up possession of the premises at Christmas, Sir C. Reed was then obliged, in consequence of the requirements of his business, to procure a lease of the Fann Street premises from the superior landlord for a term of seven years, and as property in that neighborhood had increased in value he had to pay a rent of £400 instead of He then brought in the present claim against the estate of R. Besley for £1,225, being the aggregate of £175 a year, the difference in the rent now payable for the premises from Christmas, 1877, to Christmas, 1884.

Bristowe, Q.C., and Crossley, for the claimants: Our claim is for the amount which it has cost us to make good \*the loss we have sustained by the misrepresentation of the defendant's agent. We trusted to the statement made by Besley's solicitor, who ought to have known the length of the lease. It was he who prepared the underlease, and to do that he must have had the original lease before him. It may be admitted that the error was not intentional. We do not allege that it was fraudulent, but the effect is the same. Our claim is in conformity with the decision in Burrowes v. Lock ('), where the Master of

the Rolls said the plaintiff must first make out "that the fact as represented is false, and secondly, that the person making the representation had a knowledge of a fact con-The plaintiff cannot dive into the secret retrary to it. cesses of his heart, so as to know whether he did or did not recollect the fact; and it is no excuse to say he did not recollect it, at least it was gross negligence to take upon him to aver positively and distinctly that Cartwright was enti-tled to the whole fund." This is exactly the same here. There was a similar decision in Slim v. Croucher (1), where it was not shown that there was any fraud, but that there had been forgetfulness, and the court ordered repayment of money which had been lent upon a false representation of So in Cooper v. Phibbs (\*) an agreement had been made in mutual mistake, but the plaintiff, though there was no fraud, was held entitled to have it set aside. In Barwick v. English Joint Stock Bank ('), it was held that a principal is liable for the fraudulent misrepresentation of his agent acting in the course of his business; and that no sensible distinction could be drawn between the case of fraud and the case of any other wrong. Where one party has suffered, and another has profited by the fraudulent representation of an agent of the latter, made within the scope of his authority, the former is entitled to recover damages: Mackay v. Commercial Bank of New Brunswick (4). If a lease is executed upon terms materially different from those agreed upon, and contrary to the intention of both parties, a court of equity may cause it to be reformed and corrected or set aside: Earl of Bradford v. Earl of Romney (\*); Garrard v. Frankel (\*).

\*We also contend that we are entitled to compensation by reason of the lessor having committed a breach of his covenant for quiet enjoyment contained in the lease, the covenant for quiet enjoyment extends to all lawful interruptions and disturbances by any person or persons whomso-ever during the continuance of the term, Spencer v. Marriott ('); but notwithstanding that covenant the lessor gave us notice to quit at the expiration of sixteen years instead of

twenty-three years.

Glasse, Q.C., and Eyre, for the representatives of the estate of R. Besley: The claimants had special notice by the terms of the contract for the purchase of Alderman Besley's

<sup>(1) 1</sup> D. F. & J., 518.

<sup>(\*)</sup> Law Rep., 2 H. L., 149.

<sup>(5) 30</sup> Beav., 431. (6) 30 Beav., 445. (7) 1 B. & C., 457.

<sup>(3)</sup> Law Rep., 2 Ex., 259. (4) Law Rep., 5 P. C., 394; 9 Eng. R., 202.

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business of the existence of the lease under which he held They were to take an underlease for the resthe premises. idue of the term less ten days, and such underlease was to contain the same covenants and conditions as were contained in the original lease. They ought, therefore, to have protected themselves either by asking for production of the lease for inspection, or by employing independent professional advice and assistance, when doubtless the error would have been discovered. The claimants therefore have only themselves to blame, and cannot take advantage of their own Moreover, it is now seventeen years since the underlease was granted, and it is too late to bring this claim.

This is a case in which the rule careat emptor distinctly A lessee is a purchaser, and cannot under any circumstances recover compensation after the conveyance is executed; that was laid down by your Lordship in the recent case of Manson v. Thacker (') and the principle is established by many cases commented upon in Lord St. Leonards' Vendors and Purchasers ('), and in the Concise View ('), and also in Woodfall's Landlord and Tenant ('). The case of Okill v. Whittaker (\*) is precisely the same as this, except that the lessor granted a less term than he had in the premises, and sought to make the lessee a trustee for him for the residue 107] of the term, but the bill was dismissed. The \*lessee must at his peril ascertain that the intended lessor has sufficient title to demise for the proposed term: Stanley v. Then as to the argument in respect of the cove-Hayes (\*). nant for quiet enjoyment, there was no breach of the covenant by the lessor; it was the superior landlord who gave notice, not Besley. Besley's agent only forwarded the notice, and as Reed & Fox had bound themselves by the covenants in the original lease they were bound to quit the tenancy at the expiration of the lease.

Snape, for the executors of Alderman Besley, took no part in the argument.

Bristowe, in reply.

MALINS, V.C.: This is a claim against the estate of the late Alderman Besley for £1,225 on account of misrepresentations said to have been made in carrying into effect a contract between Alderman Besley and Sir C. Reed and Mr. B. Fox, dated the 16th of July, 1861. The contract contained this stipulation, that Messrs. Reed & Fox should accept an underlease of the premises in which the business was car-

<sup>(1) 7</sup> Ch. D., 620; 28 Eng. R., 759.

<sup>(&</sup>lt;sup>3</sup>) 14th ed., p. 811.

<sup>(&</sup>lt;sup>3</sup>) Page 252.

<sup>(4) 11</sup>th ed., pp. 629, 636.

<sup>&</sup>lt;sup>5</sup>) 2 Ph., 838.

<sup>(6) 8</sup> Q. B., 105.

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ried on for the residue of the term assigned to Alderman Besley, less ten days, at the yearly rent of £225, and the underlease was to contain similar covenants to those in the original lease to Alderman Besley. The rights of the parties must depend upon this contract. Nothing can be more clear than that Reed & Fox by this contract bound themselves to take a lease of the premises for the residue of the term for which Besley held it, less ten days. If they had employed a solicitor, which they did not, or if they had inspected the original lease, they would have found out at once the extent of time for which it was granted to Besley, but this they did not do. It is quite clear that if the residue of the term had only been two years, Reed & Fox would still have been bound to take that term. It seems that Reed & Fox elected to be their own lawyers in the transaction. but they could not on that account place the lessor in a worse position than if they had employed a professional man. If they chose to take the lease without \*inves- [108] tigating the title they must suffer for it. There was no fraud or unfairness in the matter, but an accidental mistake oc-The solicitor, Mr. Micklem, who managed the business, intrusted it to a clerk, who told him that the residue of the term was for twenty-three years, while in fact it was only a sixteen years' term. The underlease, therefore, was granted to Reed & Fox, to have and to hold the premises for the term of twenty-three years, less ten days, which would have expired in the year 1884. But in 1877 it was discovered that a mistake had been made, and that the lease would expire at Christmas, 1877, the consequence of which was that Besley's representatives were bound to give up the premises at that date, and as Reed & Fox had undertaken to be bound by the covenants which were contained in the lease to Besley, it followed that they must give up the premises at Christmas, 1877.

Now as by the terms of the underlease Messrs. Reed & Fox were led to believe that they held a lease of the premises till the year 1884, it was, of course, very disagreeable for them to turn out at so short a notice, and as they could not get a renewal of the lease upon the same terms, in consequence of the rise in the value of the property, and as it was very important they should continue their business in the same premises, they were obliged to obtain a new lease at a rental of £400, which was £175 a year above what they

were previously paying.

When this matter was before me in chambers, finding the respectability of the parties, and seeing that the difficulty

had arisen from a mutual mistake, that is, that Besley's solicitor had mistaken the period for which the lease was held. and that Reed & Fox had made a mistake in not employing a solicitor and not inspecting the original lease, I made a suggestion that they should come to an arrangement, and my idea was that the justice of the case would be met by the loss being divided between the parties, each paying half of the increased rent. Sir C. Reed was willing to accede to this proposal, and was ready to sacrifice half the loss, but the proposal was resisted by the other side, and it devolves upon me now to decide the rights of the parties according to

the strict principles of law.

Now, if this error had been discovered before the execu-109] tion of \*the lease—that is, if Reed & Fox, who were to be bound by the covenants in the original lease, had called for the production of it to satisfy themselves of the terms of the covenants, as it was their duty to do, and had then found out what was the exact period for which the lease was held I think they would have been justified in claiming compensation, or possibly in rescinding the contract; but, as a matter of fact, Reed & Fox gave up their right to inspect the original lease, and took Micklem's word in regard to the the contents of that lease, and having executed the contract and bound themselves to take the residue of the term and to be bound by the covenants, they could not object to any covenants, however onerous they might be; they, in fact, bound themselves by covenants in a deed which they had not seen.

Under these circumstances, what are the rights of the parties? It has been laid down as a rule that a purchaser must be wise in time, and it is quite immaterial whether the rule is applied to a purchaser for valuable consideration or to a lessee, because a lessee is a purchaser for value, and is equally bound to look into the facts connected with the subject of the lease as a purchaser is to look into the matters connected with his purchase. That is clearly shown by the case of Legg v. Croker('); and Lord St. Leonards, in his Vendors and Purchasers (1), says that a purchaser cannot recover his purchase-money after the conveyance is executed, either at law or in equity.

Then the case of Okill v. Whittaker (') was this. ises were sold for the residue of a term, of which both parties supposed that eight years only were unexpired, and the price was fixed on that supposition, but it afterwards turned

<sup>(\*) 2</sup> Ph., 338; 1 De G. & Sm., 83. (1) 1 Ball. & B., 506.

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out that twenty years were in fact unexpired at the time of the sale. A bill filed by the vendor to make the purchaser a trustee for the vendor for the remainder of the term was dismissed.

Now, therefore, this is a case of mutual mistake, because if Micklem had known he was misstating the term of the lease, it would have been a fraudulent act on his part, and fraud vitiates every transaction. No fraud is alleged here, and therefore it could be nothing more than an innocent mistake. I know of no \*instance where a purchase [110 has been completed for many years in which the purchaser has got compensation for a defect of title when he has had ample opportunity of rectifying it.

Manson v. Thacker (1) was a case in which I decided that a purchaser could not, in the absence of fraud, obtain compensation for a misrepresentation in the subject-matter of the purchase after execution of the conveyance, where the purchaser had had the opportunity of examining the property

and discovering the defect.

Therefore, I think on every principle, independently of the covenant for quiet enjoyment in the lease, that Reed & Fox bound themselves to accept the title, and if they had any claim against Besley they should have raised the question before they completed the contract, and the court cannot now interfere. It was their own fault for taking on themselves the responsibility of acting as their own lawyers, I should have been glad under the circumstances if it could have been arranged as I suggested in chambers, but that not having been done, I cannot help coming to the conclusion I do, that the terms of the contract must be carried into effect.

Then Mr. Bristowe relied upon the covenant for quiet enjoyment, and it was argued that the lessor in contravention of that covenant gave notice to the lessee to terminate the lease at the expiration of sixteen years instead of twenty-three years, which was the period for which he was to have quiet enjoyment of the property; but in fact, although the notice was sent by the agent of the lessor, it was in consequence of the claim made by the superior landlord and not in consequence of any hindrance or interruption on the part of the lessor contrary to the terms of the covenant for quiet enjoyment.

It appears that the landlord gave notice to the representatives of Alderman Besley that the premises would have to be given up at Christmas, 1875, and Micklem, having then

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looked into the lease and discovered the mistake which had been made, wrote in February, 1877, to Sir Charles Reed, informing him of the notice by the landlord, and that the lease in fact terminated in December, 1877. Therefore it 111] was not an eviction by Besley, but an \*intimation that the superior landlord had given notice. The case of Spencer v. Marriott (') is conclusive upon that subject. that case there was a covenant by the lessor that the lessee should hold the premises without any lawful let, suit, interruption, or eviction by the lessor, or by or through the lessor's acts, means, right, &c. The lessor held under a lease for a longer term which contained a clause of re-entry by the original lessor in case the premises should be used The underlessee was not informed of this clause, and underlet to a tenant, who incurred a forfeiture by using the premises for a shop, and the original lessor evicted him. It was there held that this was not an eviction by means of the lessor within the meaning of the covenant in the underlease.

All the cases in Woodfall proceed upon the same principle, that a purchaser must at his peril ascertain that the intended lessor has sufficient title to demise for the pro-

posed term.

Under all the circumstances, being of opinion that the difficulty arose from an innocent mistake mutual to both parties, I come to the conclusion that Messrs. Reed & Fox

cannot be entitled to recover after so long a period.

I have pointed out that they would have been obliged to take the lease even if it had been for only two years, that is, that the contract having been that they should take the residue of the lease, they would have been bound to take the residue whatever the term might have been; and I have also said that they could not be entitled to claim compensation as soon as the contract was completed; how, then, could they claim compensation after a lapse of seventeen years?

I can only come to the conclusion that the claim fails, and

must be disallowed.

Glasse, Q.C., asked for the costs occasioned by the adjournment into court, but said that the defendants were willing to waive any claim for the costs of the proceedings in chambers.

Malins, V.C.: I am not inclined to hold out any encouragement to persons who claim compensation after so many 112] years. Therefore the \*claimants must pay the costs

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of adjournment into court; but by consent there will be no costs of the proceedings in chambers.

Solicitors for claimants: Carr, Bannister, Davidson & Morriss.

Solicitors for representatives of Besley: Arkcoll, Jones & Cockell.

Solicitors for executors: De Jersey, Micklem & Son.

See 9 Eng. Rep., 861 note; 12 Eng.

Rep., 862 note.
There is no rule of law fixing the time within which one may discover that a writing does not express the contract which he supposes it does, or which bars him of relief for delay other than that contained in the statute of limitations: First National, etc., v. Morgan, 73 N. Y., 593.

See ante, 645 note.

The negligence of the plaintiff in not discovering a mistake, and laches in not sooner seeking relief, are questions which make the propriety of granting relief in the given case discretionary, but do not conclusively bar the action: Hay v. Star, etc., 77 N. Y. 235, 240, affirming 13 Hun, 496.

The lapse of time before proceedings are instituted, and the fact that no question or objection was raised in regard to the form and effect of a deed until after the death of one of the parties to it, a period of nearly eight years, adds greatly to the presumption against the claim of a mistake, and increases the necessity for plain and demonstrative proof of the facts upon which plaintiff founds claim for relief: Mc-Donnell v. Milholland, 48 Md., 540.

Plaintiffs, underwriters, having executed to the defendants, iron merchants, a policy of marine insurance on a cargo which suffered loss, filed a bill for a rectification of the policy, so as to make it conformable to that which they said was the real contract between the agents, in proof of which they produced in evidence the slip which was signed by their agent when presented at Lloyd's by a clerk of the defendants' insurance broker. The defendants denied that they ever entered, or intended to enter, into any contract other than expressed by the policy.

Held, that as the slip formed no contract, and there was no binding agreement between the parties until the policy was signed and the premium paid, the bill must be dismissed with costs: Mackenzie v. Coulson, L. R., 8

Eq. Cas., 367. A., a member of the firm of A., B. & Co., who were the owners of cotton, communicated the facts touching its ownership, situation, value and risk, so far as he knew them, to C., a duly accredited agent of an insurance com-pany, and thereupon the company, through C., entered into a verbal agreement with A., acting for and on behalf of the firm, to insure for a certain period the cotton, for its whole value, against loss by fire, at a premium which was subsequently paid to the company. A. assented that the insurance should be made in his name, upon the representation and agreement of C. that the entire interest of the firm in the cotton would be thereby fully protected. The cotton was burnt within the specified period. The policy was then issued and delivered to A., who being at once advised by his attorneys that it in terms covered his interest but not that of the firm, forthwith requested the company to correct it, so that it should conform to the agreement. The company having declined to do so, A., B. & Co. filed against it this bill, praying that the policy be re-formed, and that the value of the cotton be awarded to them. Held, 1. That the acceptance of the policy was not such as waived any right of A., B. & Co. under the agreement covering their interest in the cotton which A. in their behalf had made with the company, and that they are entitled to the relief prayed for. titled to the relief prayed for. That a mere mistake of law does not, in the absence of other circumstances, constitute any ground for the re-formation of a written contract: Swell v. Insurance Co., 98 U. S. R., 85; 18 Am. Law Reg. (N.S.), 79 note.

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#### [9 Chancery Division, 112.] V.C.M., July 19, 1878.

#### In re Wedderburn's Trusts.

Trustees-Powers of Investment-23 & 24 Vict. c. 38, s. 11.

Trustees of settlements coming within the operation of Lord St. Leonards' Act, 1860 (23 & 24 Vict. c. 38), may invest the trust funds in any securities in which cash under the control of the court may be invested, notwithstanding prohibitive or restrictive words in the instrument creating the trust.

By a marriage settlement made in 1843, certain lands, hereditaments, and sums of money were settled in trust for John Wedderburn for life, with remainder (subject to provision thereby made for Charlotte Wedderburn during her life) for the children of the marriage. And it was provided that the trustees might sell and dispose of the settled funds, and lay out and invest the proceeds "in or upon any other government or parliamentary stocks or funds of Great Britain, and none other than government or parliamentary," and to vary investments, "provided always that such investment be made in none other than government or parliamentary securities of Great Britain."

There had been issue of the marriage two daughters only, who were both married, and in their marriage settlements a power was contained to invest upon government or real securities.

The opinion and direction of the court was now asked whether the trustees of the settlement of 1843 might properly invest the funds comprised in that settlement in any securities in or upon which cash under the control of the court might be invested under the 11th section of Lord St. Leonards' Act, 1860 (23 & 24 Vict. c. 38, s. 11), or whether they were confined to government or parliamentary stocks or funds, which would exclude the power to invest in real security.

113] \*Macnaghten, for the petitioners: Lord St. Leonards' first Act of 1859 (22 & 23 Vict. c. 35), s. 32, provided that trustees might invest on certain securities including real securities, "where they should not by the instrument creating the trust be expressly forbidden" to do so. This settlement does prohibit all securities except government securities. But 23 & 24 Vict. c. 38, s. 11, provides that trustees may invest in the stocks in which cash under the control of the court may be invested, and contains no such exception.

C. C. Tucker, for the respondents.

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MALINS, V.C.: I think that as the statutory power is without any exception the trustees may invest in any stocks in which cash under the control of the court may be invested, notwithstanding the prohibitive words in the settlement.

Solicitors: Freshfields & Williams.

[9 Chancery Division, 113.] V.C.M., July 24, 1878.

## BADDELEY V. BADDELEY.

[1878 B. 320.]

#### Voluntary Settlement—Declaration of Trust.

A husband by deed-poll recited as follows: "Whereas I am beneficially possessed of the ground rents hereby intended to be settled," and continued as follows: "I do hereby settle, assign, transfer, and set over unto my wife as though she were a single woman," several leasehold houses and the ground rents thereof. The deed was voluntary:

Held, that this deed was not void as being an intended assignment from husband to wife, but operated as a declaration of trust.

On the 30th of April, 1872, John Baddeley executed a deed-poll, of which the material part was as follows: "Whereas I am beneficially possessed of the ground rents hereby intended to be settled, now in consideration of my love and affection for my wife \*I do hereby settle, assign, transfer, and set over unto my said wife Eliza Baddeley as though she were a single woman, her executors, administrators, and assigns, all that my share in [certain specified houses and ground rents in Middlesex] as though she were now a *feme sole* and unmarried, and in accordance with the spirit and intention of the recent act of Parliament entitled the Married Women's Property Act, 1870."

This deed was duly registered in the Middlesex Registry,

and Mrs. Baddeley entered into the receipt of the rents.

Mrs. Baddeley claimed a declaration that the deed-poll operated as a valid assignment, and a demurrer to the claim was put in on behalf of Mr. Baddeley's legal personal representatives.

J. Pearson, Q.C., and Gregory, for the legal personal representatives: There can be no possession of a wife separate from her husband, Roe v. Wilkins ('); therefore the assignment to the wife was invalid, Moyse v. Gyles (\*); and as an assignment was intended, the voluntary gift is void: Richards v. Delbridge('). The testator had no intention of

25 Eng. Rep.

<sup>(\*)</sup> Law Rep., 18 Eq., 11; 9 Eng. R., 669. (1) 4 A. & E., 86. (2) 2 Vern., 385.

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constituting a trust: Moore v. Moore ('); Milroy v. Lord ('); Warriner v. Rogers(\*)

Glasse, Q.C., and Methold, for the widow: The word "settle" points to a declaration of trust, which is not the less good because the word "assign" is used in addition.

There is a valid declaration of trust, as in Grant v. Grant('); Mews v. Mews (\*); Lucas v. Lucas (\*); Richardson v. Rich-The wife took posardson ('); Morgan v. Malleson ('). session under the deed, which supports the gift: Walter v. The husband has shown his intention that the wife shall have the property, as in Ashworth v. Outram ("). 115] The wife took subject \*to the rent, which prevents the deed being voluntary: Price v. Jenkins (").

J. Pearson, in reply.

No one can doubt that the husband's in-Malins, V.C.: tention here was to give his wife the leasehold property; but it is contended that the deed was intended to be an assignment, and is therefore inoperative as between husband No doubt a voluntary gift by way of assignment is invalid, unless it is perfected by a transfer; the voluntary settlor must do all that he can do to transfer the property, and a husband cannot transfer to his wife. But this is, in my opinion, a case where the husband has declared himself a trustee for his wife, and she entered into possession, an act which I construe, not as an attempt to take possession adversely to her husband, which could not be done, as is shown by Roe v. Wilkins ("), but as a taking possession of her separate property under the trust. The husband was no doubt mistaken in thinking he could make this gift by way of assignment, but there is enough in the deed to make it operate as a declaration of trust which the court ought to carry into effect. law on this subject is correctly stated in Grant v. Grant ("); and I am not disposed to disagree with Richardson v. Richardson (') and Morgan v. Malleson ('), notwithstanding the remarks of Sir G. Jessel in Richards v. Delbridge ("). I therefore declare that there is a trust properly constituted in favor of Mrs. Baddelev.

Solicitors: Thomas Baddeley & Sons.

- (1) Law Rep., 18 Eq., 474. (<sup>2</sup>) 4 D. F. & J., 264. (8) Law Rep., 16 Eq., 840; 6 Eng. R., (4) 34 Beav., 623. (<sup>6</sup>) 15 Beav., 529.
- 6) 1 Atk., 270.
- (¹) Law Rep., 3 Eq., 686.

- (<sup>8</sup>) Law Rep., 10 Eq., 475.
- (\*) 2 Sw., 92, 106. (\*) 5 Ch. D., 923; 22 Eng. R., 550. (\*) 5 Ch. D., 619; 22 Eng. R., 357. (\*) 4 A. & E., 86.
- (18) 84 Beav., 628, 625.
- (14) Law Rep., 18 Eq., 11; 9 Eng. R.,

In re Adams' Settled Estates.

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## [9 Chancery Division, 116.] V.C.M., July 12, 26, 1878.

## \*In re Adams' Settled Estates.

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Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 16-Sale out of Court.

A sale out of court may be directed under the Settled Estates Act, 1877, the purchase-money being brought into court; and such a sale may be authorized to be made by public auction or private contract, subject to a reserved price to be fixed by the judge in chambers.

This was a petition for the sale, under the Settled Estates Act, 1877, of certain land settled by the will, dated in 1853. of Edward Richard Adams.

The petitioners were three legal tenants for life, one of whom was entitled in possession, and the other two in reversion; and the respondents were infants legally entitled in remainder.

The property proposed to be sold was situated at Beckenham, and was known as Elmer's End Farm. It contained sixty-five acres, and was let as agricultural land at a rent of There was evidence that the property was near a railway station, that some of the neighboring land was built over, and that it would probably fetch, if sold by auction, a sum sufficient to produce very much more than the present income.

Charles Mitchell, for the petitioners: This petition has unavoidably stood over for some weeks, and there would now be great difficulty in getting through the sale in chambers before the long vacation; the petitioners therefore ask that they may be authorized, as trustees, to sell out of court. An order for a sale out of court was made by your Lordship last week in a case of In re Andrews' Settled Estate. It appears that a beneficial offer has been made for the purchase of part of the land, and it would, therefore, be very desirable if permission were given for a sale by public auction or private contract.

Marsden, for the infant respondents.

MALINS, V.C.: I will make the order for sale of the property out of court, but the purchase-money must be brought into court, as in In re \*Andrews' Settled Estate. The []]7 order may also be for sale by public auction or private contract, but subject to a reserved price to be fixed in chambers.

The matter was again mentioned to the Vice-Chancellor, at the Registrar's request, and his Lordship directed the order to be drawn up.

Solicitors: Radcliffe, Cator & Martineau,

In re Smith's Trusts.

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# [9 Chancery Division, 117.] V.C.M., July 27, 1878.

#### In re Smith's Trusts.

Construction of Will-Bequest to Five Daughters-Persona designata.

A testatrix bequeathed the residue of her property to be equally divided between the five daughters of Samuel and Mary L. for their own use:

Held, that this was a bequest to the five daughters as persona designata and not as a class.

The will of Jenet Smith, a widow, dated in April, 1804, contained the following clause: "All the rest, residue, and remainder of my effects whatsoever I die possessed of I give and bequeath to my friend Catherine Smith, for her own private use during her life, and to her children should she have any, but should she have no children, I then leave to Jane Emma Lichigaray £1,000, to be paid for the use of the said Jane E. Lichigaray, and all the rest of my property to be equally divided between the five daughters of Samuel and Mary Lichigaray for their own use after the death of the said Caroline Smith, she leaving no children;" and there was this further direction: "no one is to have anything to do with this my will but the said Catherine Smith. I wish her to appoint some one as trustee, that in case of her death the children may have a proper person to be their guardian."

Samuel Lichigaray and Mary his wife, at the date of the will of Jenet Smith, had five children, all of whom were daughters, namely, Mary, Catherine, Caroline, Louisa, and Jane Lichigaray. Two of the daughters, Catharine and Caroline, predeceased the testatrix, who knew of their deaths. 118] The testatrix died in January, \*1814. Catherine Catherine Smith died in 1839, a widow, without ever having had a After the death of Catherine Smith the legal perchild. sonal representatives of Jenet Smith got in and realized her residuary estate, and having paid three-fifth parts to the three daughters of Samuel and Mary Lichigaray who survived Jenet Smith, the remaining two-fifths were paid into court, but no claim had been made in respect thereof by the representatives of the three children who survived Jenet Smith, or by the next of kin of Jenet Smith or any other person, and such two-fifths with the accumulations were now represented by a sum of £4,640 reduced annuities.

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The petition was presented by the personal representives of the three children who survived Jenet Smith, each claiming to be entitled to a third part of the fund in court.

Glasse, Q.C., and Hunter, for the petitioners: The question is whether, under the words of this will, the bequest to the five daughters of Samuel and Mary Lichigaray is a bequest to them as personæ designatæ or as a class. In the first place the testatrix gives the residue of her estate to Caroline Smith's children generally, that is, to a class of persons, and it may fairly be presumed that the intention was that both sets of legatees should take as a class. was the case in Doe v. Sheffield ('). This particular bequest is to the five daughters of Samuel and Mary Lichigaray. The current of authorities has been in favor of such words as these constituting a class, though there is no case in. which precisely the same expression has been used. In Knight v. Gould (') Lord Brougham decided in a case where there was a bequest of residue "to my executors hereinafter named equally between them," followed by the appointment of three executors, that the share of one executor who died before the testator went to the two survivors.

The case of Viner v. Francis (') is distinctly an authority for holding that this is a gift to a class, and so are the cases of Martin v. Wilson ('), Shuttleworth v. Greaves ('), and Barber v. Barber (\*), \*and these cases have been [119 established by the recent decision in Dimond v. Bostock ('), where your Lordship's opinion was affirmed on appeal. There the gift was "to all the nephews and nieces of my late husband except A. and B.," and that was held to be a gift to a class. It is impossible to distinguish that case from the present. There were five nephews and nieces including A. and B., and that was as clearly a gift to the other three nominatim as it is here to the five daughters; and the case of Lord Bindon v. Earl of Suffolk (\*) was equally strong, where the gift was "to my five grandchildren equally between them, or such as should survive."

W. Cooper, for the legal personal representatives of Jenet

Smith, was not called upon.

MALINS, V.C.: I have no doubt whatever as to what should be my decision in this case. If the testatrix had said "I give all the residue of my property to be divided

<sup>(1) 13</sup> East, 526.

<sup>&</sup>lt;sup>9</sup>) 2 My. & K., 295.

<sup>(&</sup>lt;sup>8</sup>) 2 Cox, 190.

<sup>4) 8</sup> Bro. C. C., 824.

<sup>(</sup>b) 4 My. & Cr., 88.

<sup>(\*) 8</sup> My. & Cr., 688.

<sup>(†)</sup> Law Rep., 10 Ch., 858; 12 Eng.

Rep., 763. (8) 1 P. Wms., 96.

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equally between the daughters of Samuel and Mary Lichigaray," that would have been a gift to a class, and if there had been twenty daughters they would all have taken a share; that is to say, a bequest to a class takes in all who survive the person at whose death the property is to be di-This is settled by cases like Doe v. Sheffield ('), Lee v. Pain ('), and Leigh v. Leigh ('). But here the gift is to the five daughters of Samuel and Mary Lichigaray. It is clear, therefore, that if a sixth daughter had been born she could not have taken under the bequest. Then why did the testatrix say five daughters? The answer is that she knew there were only five, and she intended to limit the gift to those who were in existence as tenants in common. happened that two of the five died in the lifetime of the testatrix; if it had been a gift to the daughters simply, then the three surviving daughters, being only members of a class, would have taken the whole. Suppose the testatrix had named the five daughters, could any one have doubted 120] that they would have been \*tenants in common of the fund, and if one had died could it be possible for the remaining four to take her share? What difference, then, can there be when she says "the five daughters"? It is precisely the same as if she had named them all, and they take as personæ designatæ.

If there had been no authority upon the point I should have felt myself bound to come to the conclusion that the word "five" designated the persons who were to take, and they would take as tenants in common, and the shares of the two who died before the testatrix would lapse. question is not destitute of authority: there is first the case of Lord Bindon v. Earl of Suffolk ('); the bequest was to his five grandchildren, share and share alike, equally to be divided between them, and if any of them died, then his share to go to the survivors or survivor of them. was held that the grandchildren were tenants in common and not joint tenants, so that if one died his share would go to his executors and not to the survivors. The reasons given were that by the latter words it must have been intended, if any of them should die in the lifetime of the If it were not for this clause, if any of the grandchildren had died in the life of the testator, that grandchild's fifth part would have been a lapsed legacy and have gone to the executors as undisposed of by the will; but by this

<sup>(1) 18</sup> East, 526.

<sup>(2) 4</sup> Hare, 250.

<sup>(\*) 17</sup> Beav., 605. (4) 1 P. Wms., 96.

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bequest over, if it should so happen that any of the grandchildren should die in the lifetime of the testator, such share would go to the survivors. That was exactly the

same point as in this case.

Then in Viner v. Francis (') the gift was to the children of a deceased sister, and this was held to be a gift to those who were living at the death of the testator, but Sir L. Kenyon points out the difference between that case and the case of Lord Bindon v. Earl of Suffolk, and says there the gift was to the five grandchildren, which showed that he had particular objects in view.

There is no authority opposed to this view of the case. Mr. Glasse says he cannot distinguish this case from the

decision in Dimond v. Bostock (1).

In my mind there is nothing more clear than the distinction between the two cases. In Dimond v. Bostock the testatrix gave \*personal estate in trust for all the nephews [121]and nieces of her late husband who were living at the time of her decease, except Everald Richards and Ellis Bostock, in equal shares as tenants in common. When the testatrix's husband died there were nine nephews and nieces besides the nephew and niece who were excepted. It was there held, affirming my decision, that the gift was to a class from whom two were excluded. So if it had been here to all the daughters except two it would have been the same; but it is to the five daughters, which is the same as if they had all been named. The only other case of the least importance is that of Martin v. Wilson (\*). I made a note to this case many years ago in my copy of that volume, that the case of Martin v. Wilson is opposed to Viner v. Francis ('); and I think it obviously an erroneous decision and contrary to every other case. The only authority which could be supposed to bear on this case is Knight v. Gould (1). In that case there was a bequest of residue "to my executors hereinafter named equally between them," and that was followed by the appointment of three executors, one of whom died in the lifetime of the testatrix. The Master of the Rolls held that the two survivors took the whole, and his decision was affirmed by Lord Chancellor Brougham. I think there is no doubt that this decision turned upon the official capacity of the executors, and it has no application to this case.

<sup>(1) 2</sup> Cox, 190. (2) Law Rep., 10 Ch., 358; 12 Eng. R., (3) 8 Bro. C. C., 324. (4) 2 My. & K., 295.

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My opinion therefore is that the five daughters took as personæ designatæ and not as a class, and as two died before the testatrix, their shares lapsed.

Solicitor for petitioner: A. J. Head. Solicitors for respondents: Valpy & Co.

> [9 Chancery Division, 122.] V.C.B., Jan. 11, 1878.

#### 1221 \*Provident Permanent Building Society v. GREENHILL.

[1875 P. 102.]

Mortgage—Building Society—Account—Fines—Interest, .

Fines secured by covenant in a mortgage to a building society form part of the principal in taking the account of principal, interest, and costs in a foreclosure suit by the building society, and are payable with interest.

The form of foreclosure decree in the case of a mortgage to a building society does

not differ from that in the case of an ordinary mortgage.

The bill, which was filed by ADJOURNED SUMMONS. the Provident Permanent Building Society as mortgagees, prayed an account of what was due to them for principal, interest, and costs upon their several mortgage securities from the defendants, the mortgagors, and foreclosure in de-

fault of payment.

The several mortgage deeds and memorandums of charge which were secured by deposit of deeds, and collaterally secured by promissory notes, contained covenants by the mortgagors to pay certain monthly sums on the days therein mentioned for certain terms of years, and also all fines and other sums which should, according to the rules and tables of the society, become payable in respect of their shares; and the morgagors thereby charged certain hereditaments as security for payment to the trustees of the society of the sums covenanted to be paid until all the said principal sums and interest thereon should be fully paid and satisfied.

It was provided by the rules of the society, that if any borrower should be desirous of having his property discharged from the mortgage before the expiration of the term for which his advance was taken, he might do so on giving two months' notice, and on discharging all instalments and fines due in respect thereof, and the present value of the future repayments calculated to the end of the original term. and discounted at the rate therein specified.

In the bill the amount claimed to be due to the society on

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securities was stated to be "in respect of the said promissory notes and of instalments in arrear, and fines and interest and costs," and \*"the present value of the [123]

future instalments calculated as provided," &c.

By the decree, dated the 19th of June, 1877, an account was directed of what was due to the plaintiffs for principal and interest and costs under the several indentures of mortgage and instruments in writing in the pleadings mentioned, and for their costs of the cause to be taxed, &c., with the usual directions for a reconveyance to the defendants upon payment of the amount certified to be due, and in default of payment, foreclosure.

In taking the account in chambers the question had arisen whether the plaintiffs were entitled to include in the account as principal the fines payable according to the rules of the society and covenanted to be paid by the defendants.

This question was adjourned into court.

Kay, Q.C., and Cozens-Hardy, for the plaintiffs, contended that the fines, payment of which was expressly stipulated for in the mortgage deeds, formed part of the principal secured by the mortgages, and as such must be included in taking the account as principal bearing interest.

Waller, Q.C. (Phear with him), for the defendants: The decree directs simply an account of what is due for principal, interest, and costs. If it had been intended to include these fines in the account, the decree should have been differently expressed, and framed according to the precedents for the foreclosure of building society mortgages given in Pemberton on Judgments ('), where the account is "of all subscriptions, redemption moneys, and other payments due, owing, and payable," &c. The plaintiffs have not obtained judgment in their favor as to the fines, nor did they ask any account in respect of them in the prayer of their bill; the fines cannot therefore be included in the account of principal.

BACON, V.C.: In my opinion there is no kind of question upon this subject. The mortgagee files a bill and gets the ordinary decree which has \*been, according to the [124 established rule of this court, for principal, interest, and costs under the written contract between the parties, so that in order to ascertain what is principal and interest you have to refer to the written deed. In this case the written deed stipulates that certain fines shall, in certain contingencies, be paid by the mortgagor. These fines became as much principal as the sum originally advanced by way of loan;

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and that they do so is clear, because interest is provided for by the deed. There can be no kind of question that the whole sum due for principal and fines, which are principal, and any other sum that the terms of the written contract justifies, are to be taken into consideration in taking the account. It may well have been that in the precedent referred to as directing an account of subscriptions and other things, the parties thought it necessary, for some reason, to express those things; but there is not one law for building society mortgagees and another for the rest of the Queen's subjects mortgagees. There is no ground why the fines should not be calculated in the amount due for principal, interest, and costs. The plaintiff must have the costs of this summons added to the other costs in the suit.

Kay: Your Lordship's opinion is that the fines are principal, and payable with interest according to the terms of

the deed?

BACON, V.C.: Yes.

Solicitors: Sharpe, Parkers & Co.; Prior, Bigg, Church & Adams.

See 16 Eng. R., 618 note.

In an action brought by a building association against a member, on a mortgage given to secure the payment of weekly dues and the instalments of interest on an advanced loan, the taking of the account preliminary to an order of sale should be limited to the amount of dues and interest that had accrued at the time of rendering the decree: Risk v. Building Association, 31 Ohio St. R., 517, approving Hagerman v. Ohio, etc., 25 Ohio St., 187, and Forest, etc., v. Gallagher, Id., 208.

As to fines for delinquency, see Union, etc., v. Masonic, etc., 29 N. J. Eq., 389; Johnson v. Trustees, etc., 22 Quar. L. J., 347, Circuit Court, District

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Dues cease when the association becomes insolvent: Low, etc., v. Zueker, 48 Md., 449.

Rights of members and association: Low, etc., v. Zueker, 48 Md., 449; Morrison v. Dorsey, 48 Md., 461; Mc-Donnell v. Milholland, 48 Md., 541.

In Ohio, can only make benefits payable to family or heirs of members: State v. Central, etc., 29 Ohio St. R.,

Rights of wife as against legatee in interest of husband in charitable asso-

ciation, when constitution makes payable to widow: Shamrock, etc., v. Drum, 2 Mo. App., 320.

Rights of representative of member to withdraw and take interest, or to continue the investment: Licking Co. v. Bebouts, 29 Ohio St. R., 252.

The withdrawal, by a stockholder in a building association, of his stock, is not a sale of the stock to the association, but an extinguishment or cancellation of it: Philanthropic, etc., v. Mc-Knight, 35 Penn. St. 470; 5 Quar. L. J., 148.

But see Early's Appeal, 89 Penn. St. R., 411.

Duty of association to loan to a member, and damages for refusal to do so: Stiles' Appeal, 9 Weekly Notes Cas. (Penn.), 83.

Building loan associations have power to loan money on the same security as individuals, notwithstanding their usual mode is to require the borrower to assign their own stock as collateral to his mortgage.

Where several loan associations made concurrent loans on the same building; held, that no implied obligation on all of them, to require such assignment, arises from the fact that some of them did so; and that the

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equality of such as did not was not thereby affected.

If such stock has been assigned, it must be sold first, and the amount applied on the mortgage: Union Building Loan Association v. Masonic Hall Association, 29 N. J. Eq., 389.

As to when loan to member is usurious though interest fixed by dues: Citizens, etc., v. Uhler, 48 Md., 455.

As to how payments upon a mortgage to the association by a member are to be applied: Link v. Germantown, etc., 89 Penn. St. R., 15.

As to rights of member under charter allowing to withdraw and to be paid advancements as fast as funds accumulate: Martin v. Scottish, etc., 17 Scot. L. Reporter, 221.

[9 Chancery Division, 125.]V.C.H., April 10, 1878.

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[1876 R. 89.]

Restrictive Covenant - Covenantee - Assign of - Right to sue.

The former owners in fee of a residential estate and adjoining lands, sold part of the adjoining lands to the defendant's predecessors in title, who entered into covenants with the vendors and their assigns restricting their right to build on and use the purchased land.

The same vendors afterwards sold the residential estate to the plaintiffs' predecessors in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers of the residential estate were to have the benefit of them; there was, moreover, in the plaintiffs' conveyance a covenant limiting their use of the purchased property, but such covenant was not coextensive with the covenants above mentioned.

In an action by the plaintiffs, to restrain the defendants, who had purchased the land first sold as above mentioned with notice of the first mentioned restrictive covenants, from building in contravention of those covenants:

Held, that, although the plaintiffs were "assigns" of the original covenantees, they were not entitled to sue upon the original covenants.

By an indenture dated the 29th of September, 1845, Messrs. Hoby, Winterbotham, and Russell, as the devisees in trust for sale of a mansion house and residential property known as the Mill Hill estate, and of certain pieces of land adjoining thereto, sold and conveyed two of these adjoining pieces of land to one Francis Shaw, in fee, and Shaw thereby, for himself, his heirs, executors, and administrators, covenanted with Hoby, Winterbotham, and Russell, their heirs, executors, administrators, and assigns, not to build upon the lands thereby conveyed within a certain distance from a particular road leading "to the Mill Hill house and property belonging to the said trustees;" that the garden walls or palisades to be set up along the side of the said road should stand back a certain distance from the centre of the road; that any house to be built on the land adjoining the road should be of a certain value, and of an elevation at least equal to that of the houses on a particular road;

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and that no trade or business should be carried on in any of such houses or buildings, but that the same should be used as private dwelling houses only. The conveyance did not 126] \*state that this covenant was for the protection of the residential property, or in reference to the other adjoining pieces of land, or make any statement or reference thereto.

The same trustees also sold about this time other pieces of lands adjoining the Mill Hill estate; and the conveyance to the purchaser in each case contained restrictive covenants similar to those above mentioned. It was alleged by the plaintiffs in their statement of claim that the intention of all the restrictive covenants was to protect and maintain the value of the Mill Hill estate, and to secure the continuance of the surrounding neighborhood as purely residential in character.

The trustees, in December, 1854, sold and conveyed the Mill Hill estate to T. P. Bainbrigge in fee, and, Bainbrigge having died, his devisees in trust, in September, 1870, sold and conveyed the same estate to the plaintiffs as tenants in common in fee.

In neither of these two conveyances were there covenants similar to those in the conveyance to Shaw, but there was in the conveyance to the plaintiffs a covenant by them with their vendors not to build a public house or carry on offensive trades upon a particular portion of the property conveyed to them. Neither of the two conveyances recited or mentioned in any way the conveyance or sale to Shaw, or the existence of any restrictive covenant entered into by Shaw or by Gadsby, nor did either of them recite or mention the sales or conveyances of the other pieces of land sold as above mentioned.

There had also been a devolution title with regard to the lands sold to Shaw, for after his death Mary Shaw, the person entitled under his will, in August, 1867, sold and conveyed part of the lands comprised in the indenture of September, 1845, to John Gadsby in fee, who, in his conveyance, entered into convenants with Mary Shaw, her heirs, executors, and administrators, substantially identical mutatis mutandis with the restrictive covenants contained in the indenture of the 29th of September, 1842. And subsequently the lands so conveyed to Gadsby were sold and conveyed (with certain buildings erected thereon) by Gadsby, or persons deriving title through him, to the defendants as tenants in common in fee.

The plaintiffs alleged that the defendants were carrying on

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\*upon their lands and in contravention of the restrictive covenants first above mentioned, the trade of wheelwrights, smiths, and bent timber manufacturers, and had erected a high chimney which emitted thick black smoke, and that those acts were destructive of the residential character of the neighborhood, and had deteriorated the value and amenity of the Mill Hill estate. By their action they claimed an injunction to restrain the defendants from carrying on any trade or business upon their lands, and from permitting the buildings erected thereon to be used otherwise than as private houses, and from contravening in any manner the restrictive covenants contained in the indenture of September, 1845.

The principal question argued, and that on which the decision turned, was as to the right of the plaintiffs to sue

upon these covenants.

It appeared that no contract had been entered into or representations made either upon the occasion of the purchase by Bainbrigge from the trustees, or upon the purchase from Bainbrigge by the plaintiffs, that the purchaser should have the benefit of the covenants entered into by Shaw with the trustees.

Dickinson, Q.C., and Renshaw, for the plaintiffs: defendants are the assigns of the covenantors, whose rights were restricted by these covenants, and they took with no-The plaintiffs are the successors in title of the tice of them. covenantees, and the owners of the residential property, for the protection of which the covenants were entered into. They are accordingly entitled to sue the defendants on these covenants, and to prevent them from contravening them in the same manner as if the defendants had themselves been the covenantors, and the plaintiffs the covenantees: Richards v. Revitt (').

[HALL, V.C.: The question is, whether you are entitled to sue as the assigns of the covenant; you are not under a corresponding covenant with the defendants, and your covenant with your own vendors comprises only part of the covenant entered into by the defendants' predecessor in title. Are you entitled to the benefit of Shaw's covenants without contract, express or implied, as in \*the cases of cove- [128] nants entered into there being a laying out in lots and a general building scheme? I refer to the cases of Western v. Macdermott (\*); Child v. Douglas (\*); Keates v. Lyon (\*).

<sup>(1) 7</sup> Ch. D., 224; 23 Eng. R., 539,

<sup>(\*)</sup> Kay, 560; 5 D. M. & G., 789. (4) Law Rep., 4 Ch., 218.

<sup>(2)</sup> Law Rep., 2 Ch., 72.

W. Pearson, Q.C., for the defendants, referred to Mas-

ter v. Hansard (').]

In Western v. Macdermott there was, as in this case, a double devolution of title, i.e., both from the covenantor and the covenantee, and the case is in reality an authority in our favor, as is shown by the report in the court below (\*).

In Keates v. Lyon the covenant was not with the covenantee "and his assigns," and the case is distinguishable on

that ground alone.

[HALL, V.C.: Lord Justice Selwyn there classified the cases, and I collect that his judgment would have been the same had the word "assigns" been added.]

Moreover, there the persons who took the property subject to the covenant, took it without notice of the covenant. And the estate of which we are now owners is the very same residential property which was retained by the covenantees, and for the protection and benefit of which the restrictive covenants were entered into. They also referred to Master v. Hansard and Mann v. Stephens (\*).

W. Pearson, Q.C., and Bury, for the defendants, were

not called upon.

HALL, V.C.: I think this case is governed by Keates v. Lyon, by Child v. Douglas ('), as ultimately decided by Vice-Chancellor Wood (\*), who, after granting an interlocutory injunction in the first instance, refused to grant the plaintiff an injunction at the hearing, and by the case of Master v. Hansard.

The law as to the burden of and the persons entitled to the benefit of covenants in conveyances in fee, was certainly 129] not \*in a satisfactory state; but it is now well settled that the burden of a covenant entered into by a grantee in fee for himself, his heirs, and assigns, although not running with the land at law so as to give a legal remedy against the owner thereof for the time being, is binding upon the owner of it for the time being, in equity, having notice thereof. Who, then (other than the original covenantee), is entitled to the benefit of the covenant? From the cases of Mann v. Stephens (\*), Western v. Macdermott (') and Coles v. Sims (\*), it may, I think, be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should

<sup>(1) 4</sup> Ch. D., 718; 21 Eng. R., 671.

<sup>(\*)</sup> Law Rep., 1 Eq., 499; 35 Beav., 243. (\*) 15 Sim., 377.

<sup>(4)</sup> Kay, 560; 5 D. M. & G., 739.

<sup>(5) 2</sup> Jur. (N.S.), 950. (°) 15 Sim., 377.

<sup>1)</sup> Law Rep., 2 Ch., 72.

<sup>(8)</sup> Kay, 56; 5 D. M. & G., 1.

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be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where, the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such contract need not be express, but may be collected from the transaction of sale and purchase. considering this, the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into, is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant: whether the purchaser claiming the benefit of the covenant has entered into a similar covenant, may not be so important.

\*The plaintiffs in this case, in their statement of [130] claim, rest their case upon their being "assigns" of the Mill Hill estate, and they say that as the vendors to Shaw were the owners of that estate when they sold to Shaw a parcel of land adjoining it, the restrictive covenants entered into by the purchaser of that parcel of land must be taken to have been entered into with them for the purpose of protecting the Mill Hill estate, which they retained; and, therefore, that the benefit of that restrictive covenant goes to the assign of that estate, irrespective of whether or not any representation that such a covenant had been entered into by a purchaser from the vendors was made to such assigns, and without any contract by the vendors that that purchaser should have the benefit of that covenant. The argument must, it would seem, go to this length, viz., that in such a case a purchaser becomes entitled to the covenant even although he did not know of the existence of the covenant, and that although the purchaser is not (as the purchasers in the present case were not) purchaser of all the property retained by

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the vendor upon the occasion of the conveyance containing the covenants. It appears to me that the three cases to which I have referred show that this is not the law of this court; and that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not showing that the benefit of the covenant was intended to enure for the time being of each portion of the estate so retained or of the portion of the estate of which the plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant, that is, it must appear that the benefit of the covenant was part of the subject-matter of the purchase. Lord Justice Bramwell, in *Master* v. *Hansard* (1), said: "I am satisfied that the restrictive covenant was not put in for the benefit of this particular property, but for the benefit of the lessors to enable them to make the most of the property which they retained." In the present case I think that the covenants were put in with a like object. If it had appeared in the conveyance to Bainbrigge that there were such restrictive 1311 covenants in \*conveyances already executed, and expressly or otherwise that Bainbrigge was to have the benefit of them, he and the plaintiffs, as claiming through him, would have been entitled to the benefit of them. But there being in the conveyance to Bainbrigge no reference to the existence of such covenants by recital of the conveyances containing them or otherwise, the plaintiffs cannot be treated as entitled to the benefit of them. This action must be dismissed with costs.

Solicitors: Satchell & Chapple, agents for J. Gadsby, Derby; R. Wastell.

(1) 4 Ch. D., 724; 21 Eng. R., 676.

See 16 Eng. R., 298 note; 19 Eng. 24 Eng. R., 486 note; 25 Eng. Rep., R., 289 note; 23 Eng. R., 332 note; 636 note.

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Will-Construction-"Issue"-"Children."

A testator by his will gave a fund to trustees "in trust for the lawful issue of F. H. surviving him equally to be divided between them if more than one . . . and if but one then for such only child," with a gift over "in default of issue of F. H. becoming entitled."

The issue of F. H. who survived him were a son, a daughter, four children of the

son, and six children of a deceased daughter:

Held, that by the use of the word "child" the testator had himself interpreted the word "issue," and that the word "issue" must be restricted to children, and the fund go in moieties between the surviving son and daughter.

Carter v. Bentall (1) and Wyth v. Blackman (2) discussed.

PETITON. John Hopkins, by his will, dated the 6th of March, 1828, bequeathed all his personal estate to trustees on trust for his wife, for life, and directed his trustees, after her death, to stand possessed of a sum of £2,000 Consols, part thereof, upon trust to pay the dividends to Francis Hales during his life, and after his death to his widow during her life, and after the deaths of both, then to hold the fund upon the trusts following, viz.:—

"In trust for the lawful issue of the said Francis Hales surviving him equally to be divided between them if more than one share and share alike, and if but one then for such only child, that is to \*say, in trust to transfer and [132 pay the share or respective shares of such as shall be twentyone years of age, or become married, at or before the expiration of twelve calendar months from the decease of the survivor of the said life annuitants, or upon the solemnization of such marriage or marriages, with the dividends And as to the share or shares of such as shall be under age, in trust to pay such share or shares to the respective parties as they shall respectively attain the age of twenty-one years or be married, and pay and apply the dividends in the meantime unto and for the respective use and benefit of such minors. And in case of the death of any or either of the said parties before his, her, or their attaining the age of twenty-one years or being married, the share or shares of him, her, or them so daying to be payable and paid at the respective periods aforesaid to the survivors or survivor of them. And in default of issue of the said F.

(1) 2 Beav., 551.

(3) 1 Ves. Sen., 197,

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Hales becoming entitled to the said £2,000 £3 per Cent. Consols, it is my will that the same principal sum and the dividends and proceeds thereof shall go to such person or persons and in such manner as my said dear wife Christian Hopkins shall by her deed or will direct, appoint, or bequeath the same unto. And in default of such gift, appointment, or bequest by my said wife, the same sum of £2,000 £3 per Cent. Consols shall sink into and become part of the residue of my personal estate for the benefit of my residuary legatees after named."

The testator died on the 10th of March, 1828, and his

widow died in February, 1835.

Francis Hales died on the 28th of November, 1875, without leaving a widow, and having had three children only, viz., Catherine, who married William Chapman and died in 1860, leaving six children, all of whom were still alive; Francis Richard, who married in 1866, and had issue four children, all born before the death of Francis Hales and still alive; and Elizabeth, who was still living and a spinster. So that the "issue of Francis Hales surviving him" were a son, a daughter, six children of the son, and four children of a deceased daughter; and the question having arisen whether the word "issue" was not by the context of the will restricted to "children," the trustees transferred the sum of £2,000 Consols into court under the Trustee Relief Act, and 133] the \*son and daughter who survived Francis Hales now petitioned that the fund might be transferred to them.

Dickinson, Q.C., and Stock, for the petitioners: The word "issue" must be read as meaning children, for the testator, by the use of the word "child," has so explained it. This case is the converse of Sibley v. Perry ('), where the word "issue" was restricted to "children" by the use of the word "parent." It is in fact not to be distinguished from Carter v. Bentall ('), where the words were, "and if only one child then to such one child;" for though there is there a gift over in default of "such issue," while here it is in default of "issue... becoming entitled" to the fund, in each case the issue must be such as has been previously defined, for in neither case is it a gift over in default of all issue, but of a particular issue.

[Hall, V.C.: Your argument goes to this, that if there had been no child who survived, the gift would not have

taken effect.

Yes; and other authorities in our favor are: M'Gregor v.

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M'Gregor ('); Ellis v. Selby ('); Peel v. Catlow ('); Baker v. Bayldon ('); In re Merceron's Trusts ('). The fund is accordingly divisible into moieties between the two petitioners.

Eddis, Q.C., and Phear, for the six children of Catherine Chapman: The word "issue" must be taken in its wide and general sense unless it is clearly controlled by the context, and the plaintiffs must show that it is so controlled. the gift to the issue of Francis Hales is a gift to take effect after three life interests, and this gift over is not, as in Carter v. Bentall, in default of "such issue," but generally in default of issue becoming entitled, who to become entitled must "Child" is a flexible word and survive Francis Hales. may mean "grandchild," and the expression "only child" occurring once only, and then used to designate a single descendant of Francis Hales, is not sufficient to cut down the natural meaning \*of the recurring word "issue," [134] with which all the other referential expressions are consistent. In M'Gregor v. M'Gregor (') the testator himself, by a codicil, interpreted the word "issue" in his will as meaning children; and there was also what amounted to an express interpretation in Ellis v. Selby (\*), Peel v. Catlow (\*), and Baker v. Bayldon ('); while in In re Merceron's Trusts (\*) the only question was as to the meaning of the expression "die without issue." On the other hand, the word "children" may be extended to and treated as synonymous with "issue": Wyth v. Blackman (\*); Dalzell v. Welsh ('). The fund is accordingly divisible in twelfths.

Oswald, for the four children of Francis Richard Hales,

supported the same contention.

Daw, for the trustees of the will.

Dickinson, in reply.

HALL, V.C.: I will, in the first instance, consider the construction of this will without reference to authority. The trust is "for the lawful issue of the said Francis Hales surviving him equally to be divided between them, if more than one share and share alike, and if but one then for such only child," and the testator then declares when the shares are to be transferred and paid. Considering that portion of the will according to the plain meaning of the words, and taking into consideration that the word "issue" is one which, though ordinarily used and taken to mean all issue,

<sup>(1) 1</sup> D. F. & J., 63.

<sup>(2) 7</sup> Sim., 352. (3) 9 Sim., 372.

<sup>(4) 31</sup> Beav., 209.

<sup>(\*) 4</sup> Ch. D., 182; 19 Eng. R., 759, (\*) 1 Ves. Sen., 197, 200, (\*) 2 Sim., 319, 326,

whether children or more remote descendants, yet may be, and not unfrequently is, used with reference to "children," it appears to me that the testator in creating this trust for issue was creating a trust for children. His words are, "if but one" (i.e., one issue), "then for such only child," that is to say, "an only child is to take under the trust which I have declared in favor of issue, if there be only one child." That being so, it seems to me that the right \*and correct interpretation of this will is to say that the testator used the word "issue" in the sense of children. In providing for issue he says, "if only one," that is, "if there is only one person to take under the trust for issue, then to such only child," meaning by "one" an only child. I consider that the testator has himself interpreted the word "issue." and explained it to mean children. As regards the subsequent parts of the will, I do not think that there is anything in the observation that he afterwards speaks of the persons to take, not by the description of "issue" or "children," but as "parties," for that is a proper mode of expression in either sense of the word "issue." The ultimate trust is "in default of issue of the said Francis Hales becoming entitled." The word "issue" alone is used there, he does not say "such issue;" but the absence of the word "such," when once you have interpreted the word "issue," is im-An interpretation of the preceding trust having material. been arrived at, the construction of the referential provisions becomes comparatively unimportant. The trust in default of issue, if issue be restricted to children, amounts to a trust in default of children becoming entitled to the fund. No doubt "becoming entitled" includes two things; they must be children who survive their parents, and they must also attain the age of twenty-one years or marry. merely another portion of the description or qualification of the persons to take, which does not necessarily enlarge the meaning of the term "issue." Such is the conclusion I arrive at independently of authority.

Then, as to the authorities, the only case which has any direct bearing is that of *Carter* v. *Bentall* ('), which is to my mind not materially distinguishable from the present. It is certainly not so, having regard to the reasoning of the Master of the Rolls in his judgment. Mr. Eddis pointed out that in that case there was a reference to the marriage of the testator's daughter, and that there the word "issue," used in reference to her marriage, was rightly held to mean the issue of her marriage. I think that is rather a refinement. It is

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not referred to by the Master of the Rolls in his judgment, which did not proceed at all upon that, but upon the use which the testator made of the word "child," immediately \*after the word "issue." The words of the trust [136 there were "and if only one child." Here the word "child" is left out after the word "one." But even if we supply "issue" from the previous word "issue," yet a child is to take; whichever word is supplied, we arrive at the same construction.

With reference to the difference in construction where the word "child" is contained in the trust itself, and where it is merely contained in an explanatory or referential clause, I may refer to the case of Wyth v. Blackman ('), where Lord Hardwicke, in considering the construction of an explanatory clause, said ('), "If it rested on the word 'issue,' there is no doubt . . . . The great objection to this is from videlicet, that being an explanatory clause, it restrains issue to children; but that was not the donor's meaning; which was, as is said for the defendants, principally to explain the shares thereby; although he might mean both." That is to say, he considered that the clause which contained the word "child" was a clause explaining in what shares the property was divisible. That particular clause was considered by Lord Hardwicke to be put in to prevent any question about the shares of the different children. In the particular case he thought he found, in other portions of the will, expressions which would assist the interpretation. He certainly did, in arriving at a confusion, go to a considerable extent upon the probable intention of the testator to include as many as possible. I must, however, decline to speculate as to probable intentions. Observations might be made on both sides. I cannot guess, but must do my best to construe the instrument upon the words themselves, only saying, as regards the general intention, that in any possible view this will contains an unreasonable disposition of the testator's property. Taking, therefore, the words as I find them, the true interpretation is that the word "issue" was used by the testator in the sense of "children." He has. I consider, thus explained himself, and the only persons who can take are the two children of Francis Hales who survived him.

I observe that in the case before Lord Hardwicke he referred to Crooke v. Brookeing (3) and observed that, according to the \*authorities, grandchildren and great- [137 grandchildren might come in under the term "children."

<sup>(1) 1</sup> Ves. Sen., 197.

<sup>(9) 1</sup> Ves. Sen., 200.

<sup>(8) 2</sup> Vern., 106.

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With regard to that I can only say that such a latitude of construction is not now adopted.

Solicitors: Hancock, Sharp & Hales; Rhodes & Son, agents for R. Porter, Ipswich; H. C. Soden; Walker, Martineau & Co.

## [9 Chancery Division, 187.]

V.C.H., May 8, 1878.

#### SPENCER V. CLARKE.

[1877 C. 459.]

Policy of Assurance—Equitable Mortgage—Assignment—Notice—Priority—Construc-tive Notice—Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144).

An agreement in writing to execute on request an effectual mortgage of a policy of assurance deposited at the time of the agreement as security for a loan, is not an "assignment" of such policy within the meaning of the Policies of Assurance Act,

Accordingly, notice to the Assurance Company of such an agreement does not give under that act any priority over a prior equitable mortgagee who has given no notice but has possession of the policy.

The holder of a policy of assurance on his own life deposited it with A. by way of equitable mortgage to secure a loan. A. retained the policy, but gave no notice to

the company.

B. afterwards, in ignorance of this prior mortgage, agreed to lend money to the policy holder upon a deposit of the same policy, and the policy holder, alleging that he had left the policy at home by mistake, and promising forthwith to deliver it to B., took the loan and signed a memorandum that he had deposited the policy with B., and that he undertook on request to execute to B. an effectual mortgage of it.

B. gave to the company notice of his loan and memorandum of deposit, and frequently applied to the policy holder for the policy, but the policy holder made various excuses for not handing it over, and died leaving it in the possession of A.:

Held, that the circumstances of the case were such as to put B. on inquiry at the time of the loan, and to fix him with constructive notice of A.'s security, and that the title of A, as in possession of the policy, must prevail over that of B, although B. did and A. did not give notice to the company.

In March, 1875, Thomas Spencer, since deceased, and the plaintiff Evans, his brother in law, both of Tredegar in Wales, agreed to lend to T. W. Clarke, of Chepstow, the sum of £1,000 in two several sums of £500 each, upon the 138] security of a deposit of two several \*policies of assurance of £500 each upon the life of Clarke, one with the Standard Life Assurance Company and the other with the Westminster and General Life Assurance Association, and of a memorandum of deposit and bond. Evans left the completion of the loan to Spencer, and on the morning of the 31st of March, 1875, Spencer and Clarke went to Spencer's solicitor at Tredegar, and gave instructions for the preparation of the memorandum and bond. Clarke handed over to the solicitor an envelope containing the Standard

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policy for £500, a receipt for the last premium upon it, a receipt for the last premium on the Westminster and General policy for £500, and a policy for £1,000 with the Railway Passengers Insurance Company; and when asked for the Westminster and General policy, he answered that unfortunately he had put the railway policy into the envelope in mistake for it, but that he had it at home at his house in Chepstow (about two hours' journey from Tredegar), and that directly he returned he would be sure to send it to Spencer being satisfied with this assurance, the bond and memorandum were prepared, and later in the same day were executed. Upon execution the £1,000 was paid to Clarke, and the envelope with the Standard policy

and receipts was delivered to Spencer.

The memorandum of deposit was in the following terms: "Memorandum that I, T. W. Clarke, have this day borrowed and received the sum of £500 from Thomas Spencer, and also the like sum of £500 from John Evans, and have secured the repayment of the two several sums of £500 and £500, making together the sum of £1,000, with interest after the rate of £5 per centum per annum, by my bond under s-al bearing even date herewith, and for the better and more effectually securing the same sums with interest as aforesaid, I have deposited with them the said Thomas Spencer and John Evans all those two policies of assurance for the sum of £500 each effected on my life in the Standard Life Assurance Company and the Westminster and General Life Assurance Association respectively. And I do hereby for myself, my heirs, executors, and administrators, promise and undertake to make, execute and deliver unto them the said Thomas Spencer and John Evans, their heirs, executors, administrators, and assigns, when thereunto requested by him or them so to do, a valid and effectual \*mortgage of the said two policies of assurance [139 for the said principal sum and interest, the mortgage to contain such usual powers, covenants, provisions, and declarations as their counsel or solicitor, or their heirs, executors, administrators, or assigns shall advise or require, and to be prepared and perfected at my proper costs and charges, or that of my heirs, executors, or administrators. And I further undertake that if from my refusal or neglect to execute the said mortgage security it shall be requisite to stamp this instrument, that I will pay all attendant and subsequent expenses of stamping the same, and the amount so paid shall be a charge upon the said two policies of assurance."

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Notice of the deposit of the policy and of the memorandum of deposit was given on the 10th of May, 1875, to the Standard Company and also to the Westminster and General Association, and the receipt of the notice was duly acknowledged by both companies in accordance with sect. 6 of the Policies of Assurance Act.

Frequent applications were made to Clarke by Spencer and Evans for the Westminster and General policy, but Clarke made various excuses for not handing it over to them, and never, in fact, did deliver it to them.

Thomas Spencer died in May, 1876, and Clarke died in

June, 1877.

In August following, the plaintiffs, Richard Spencer (the legal personal representative of Thomas Spencer) and Evans, for the first time discovered that Clarke had in July, 1871, deposited the Westminster and General policy with one W. Tranter as security for a loan of £100 and interest. Tranter had ever since retained the policy in his possession, but he never gave any notice to the Association of his equitable mortgage until after the death of Clarke, when he required from them payment of the moneys secured by the policy.

The plaintiffs then brought this action against Clarke's legal personal representative and Tranter, for a declaration that they were entitled to the moneys payable under the Westminster and General policy in priority to Tranter, and

for ancillary relief.

W. Pearson, Q.C., and Hemings, for the plaintiffs: The plaintiffs are entitled to priority, first, under the Policies 140] \*of Assurance Act, 1867, because the deposit of a policy of assurance accompanied by an agreement in writing to execute a legal mortgage on request constitutes an equitable assignment within the meaning of the act, and under sect. 3 entitles the equitable assignee who gives notice to the office to priority; and Crossley v. City of Glasgow Life Assurance Company (') is no authority against this proposition, for there was in that case nothing which amounted to an equitable assignment. Secondly, independently of the statute, because under the general law it is in fact the notice which gives the title in the assignment of a chose in action, and here the notice rendered the insurance company trustees for the plaintiffs. There is, in fact, no competition between an assignee who has and an assignee who has not given notice, unless the former is affected with knowledge of the equities of the latter. In the present case, although

<sup>(1) 4</sup> Ch. D., 421; 20 Eng. Rep., 653.

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the policy was not delivered to the plaintiffs, sufficient excuses were made to them for the non-delivery; they had not even constructive notice of Tranter's mortgage; and while they were diligent in giving notice, Tranter was negligent, and, having no better equity than the plaintiffs, he must suffer for his negligence: Foster v. Blackstone (1); Foster v. Cockerell (\*) Meux v. Bell (\*); Fisher on Mortgages (1).

Dickinson, Q.C., and Renshaw, for the defendant Tran-

ter, were not called upon.

Selfe, for the defendant Clarke.

HALL, V.C.: I am of opinion that as between the plaintiffs in this action and the defendant Tranter, the defendant Tranter is entitled to priority as to the policy in the Westminster and General Life Assurance Association. That policy was deposited with him by way of equitable security. He is first in point of time, and therefore first as regards his security. The plaintiffs being second in order of time must be second also in order of priority, unless they got priority \*by the notice which they gave to the insurance [14] office, Tranter not having given notice of his security.

It is said that the plaintiffs are entitled to priority by reason of the provisions of the statute 30 & 31 Vict. c. 144. It appears to me that there is no ground for that contention. In order to bring the case within the statute, there must. according to the plain words of the statute and the explanatory form of assignment given in the schedule, be an assignment, and an agreement to assign upon request is not an assignment. I must now consider the effect of the policy having been actually delivered to Tranter. The only excuse which the plaintiffs put forward for not having obtained possession of the policy is, that they were told a lie by their mortgagor Clarke. The security which he was to give was a deposit of the Westminster policy as well as the Standard policy, and he ought (when he came to receive the money) to have had the Westminster policy with him. Instead of that, he produced a paper document which was not the policy in question, but which he seems to have represented he had put into the envelope by mistake. I cannot say that this was sufficient to excuse persons who were advancing money from making further inquiry. They were not justified in relying on such a representation. I am not aware that there is any case precisely in point where the subject.

<sup>(1) 1</sup> My. & K., 297. (2) 9 Bli. (N.S.), 332. 25 Eng. Rep.

<sup>(\*) 1</sup> Hare, 78. (\*) 8d ed., ss. 1409, 1410, pp. 870, 871.

of the charge was a policy of assurance, but there is a case which is very analogous to the present, viz., Maxfield v. Burton (1). In that case there was an equitable mortgage by deposit of the title deeds of real estate, and there was a subsequent contract signed by the owner of property in contemplation of marriage, by which he agreed to make a settlement. He was asked for the title-deeds, and he told a lie: he said they were with his bankers for safe custody, but that was not true; they were there for the purpose of giving the bankers security. However, the parties were satisfied; the marriage took place on the faith of the representation so made, and an instrument of settlement was executed. wards, when the equitable mortgage was discovered, the parties entitled under the settlement set up the claim that they were innocent purchasers for value of the legal estate But what did the Master of the Rolls without notice. say ? (1) "On the question of notice I have no doubt. 142 is clearly a case of constructive notice. A \*man on his marriage has a freehold estate; he tells the solicitor for the lady with whom he is about to be married, on being asked for his deeds, 'They are deposited with my bankers for safe custody.' The solicitor does nothing more, and it turns out that they are pledged to the bankers. I hold that it was the duty of the solicitor to make further inquiry of the bankers, and to ask for the deeds. If he had done so he would have been told that the representation made to him of their being deposited for safe custody, which of course meant safe custody only, was incorrect, inasmuch as they were deposited by way of mortgage, and upon that mortgage a considerable sum of money was then due. I consider that that was constructive notice, and bound the lady who was about to be married." That appears to me an anal-Would a prudent person have ogous case to the present. taken the risk of the truth of the representation made by the borrower? A prudent person would have told Clarke to bring the policy that same night, or would have offered to go or send to Chepstow to get it, and would have declined to part with the money until he had received the Vice-Chancellor Kindersley, in Rice v. Rice (\*), in commenting upon the case of Maundrell v. Maundrell ('), says, "We have here, then, ample authority for the proposition, or rule of equity, that as between two persons whose equitable interests are of precisely the same nature and

<sup>(1)</sup> Law Rep., 17 Eq., 15; 7 Eng. R., 641. (2) Law Rep., 17 Eq., 18; 7 Eng. R., 645.

<sup>(\*) 2</sup> Drew., 73, 81.

<sup>(4) 10</sup> Ves., 271.

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quality, and in that respect precisely equal, the possession of the deeds gives the better equity." That case shows what importance is attached by the court to the possession of the The Vice-Chancellor Malins, in the case of Layard v. Maud ('), says: "I have not a shadow of doubt that where there is merely an equitable mortgage unaccompanied by the legal estate, in every case where the equitable mortgagee either omits to get, or having got, gives up possession of the deeds, he must always be postponed. In this case I must come to the conclusion that there is that degree of negligence in Mr. Austen which will postpone his claim as first mortgagee to that of Messrs. Halford. I decide this case on the general principle that one equitable mortgagee, without possession of the deeds, must be postponed to another who has that possession." I am not dealing with a case where one of the parties has a legal \*title: in such [143] a case there are considerations as to the circumstances under which parties can on equitable grounds be deprived of the benefit of the legal estate. The policy in this case was the really substantial thing. The money having been lent by the plaintiffs without the policy, and another person having previously got the policy into his possession, no pains were taken by the plaintiffs to ascertain where the policy was. I consider that the title of the holder of the policy must prevail over the title of the plaintiffs, although the plaintiffs gave notice to the insurance office, and he did not.

Solicitors: Stevens & King, agents for C. H. Harris, Tredegar; Waterhouse & Winterbotham, agents for Winterbotham, Bell & Winterbothams, Cheltenham; Jones & Starling, agents for Norris & Miles, Tenbury.

(1) Law Rep., 4 Eq., 897, 406.

[9 Chancery Division, 143.]
 V.C.H., May 18, 1878.
 SMITH V. HILL.
 [1876 S. 6.]

Investment upon Mortgage of Land—Bequest of Residue of Personalty for Life and in Remainder—Mortgage of Reversionary Interest—8 & 4 Will. 4, c. 27, s. 42—Interest.

A. was legatee in reversion after certain life interests of a testatrix's residuary personal estate. The estate consisted wholly or chiefly of a sum of £3,000 invested on mortgage of real estate by the testatrix and continued on such investment by her trustees. A. mortgaged his interest in the £3,000, and after sixteen years (during which A. paid no interest on his mortgage) A.'s reversion fell into possession:

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Held, that A.'s mortgagee was entitled as against the residuary estate to recover the whole arrears of interest, the mortgage by A. not being a charge on real estate within the meaning of sect. 42 of the Statute of Limitations (3 & 4 Will. 4,

Semble, however, that if it had been a charge on real estate, the fact of the interest being reversionary would not have prevented the operation of sect. 42 in barring arrears of interest beyond six years.

Vincent v. Guing (1), Sinclair v. Jackson (2), and Wheeler v. Howell (3), discussed.

ALICE WARD, who died in 1826, by her will, made in April, 1824, bequeathed her residuary personal estate to her 144] executors \*upon trusts for investment, and for the benefit of Elizabeth Catherine Hill the elder for life, and after her death for Elizabeth Catherine Hill the younger, Caroline Hill and the defendant Harriet Hill for their lives, and after their deaths for their children, and if they should die without having children, upon trust for William Wilkes Hill.

Alice Ward at her death was possessed of a sum of £3,000, which was secured by a mortgage, executed in 1824, of undivided shares in a manor and hereditaments at Beeston. This sum formed the main part of her residuary estate, and

was allowed to remain outstanding.

W. W. Hill, by an indenture dated the 27th of September, 1861, assigned to the plaintiff, Ambrose Smith, his reversionary interest in the £3,000 by way of mortgage to secure the repayment of £1,741 7s. 4d. and interest. W. W. Hill died intestate on the 20th day of June, 1871, indebted to various judgment, specialty, and other creditors, as well as to the plaintiff, and was possessed of no property except his reversionary interest in the £3,000.

No interest had been paid by him on the sum of £1,741 E. C. Hill the elder died many years ago, and E. C. Hill the younger and Caroline Hill, who were living at the

date of the mortgage in 1861, had died spinsters.

The plaintiff, Ambrose Smith, brought this action for the administration of the testatrix's estate, in order that he might obtain payment of the money due to him upon the mortgage security. After the commencement of the action Harriet Hill died without having had any issue, and the manor and hereditaments situate at Beeston were sold in 1877, and the mortgage money of £3,000 was paid to the trustees in whom it had become vested.

The plaintiff now applied by summons, adjourned into court, for payment of the entire fund in part discharge of his mortgage debt of £1,741 7s. 4d., and the interest which had accrued due thereon between the years 1861 and 1878,

<sup>(1) 1</sup> J. & Lat., 697, 701. (\*) 17 Beav., 405, 410. (3) 8 K. & J., 198, 201.

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the whole amounting to the sum of £3,171 3s. 9d. The question was whether, as between the plaintiff and the legal personal representative of the mortgagor, the plaintiff was entitled to interest for the whole period, or for not more than give years prior to the date of the action.

than six years prior to the date of the action.

\*Hastings, Q.C., and Bunting, for the plaintiff: [145] The statute 3 & 4 Will. 4, c. 27, s. 42, does not apply to a reversionary interest of this kind: Wheeler v. Howell(1). If the statute does apply, this is not a proceeding to recover interest under the provisions of the 42d section. Edmunds v. Waugh (1), and the decisions in In re Haselfoot's Estate (') and in In re General Provident Assurance Company (1), are authorities which apply to this case. The statute does not apply to a reversionary interest. The 42d section enacts that no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land shall be recovered by any action, but within six years next after the same shall have become due, "Provided nevertheless that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid." The intention was to show the principle upon which the section was founded. If a person should be in a position to take the fruit of property, his own neglect in not enforcing his claim for the period of six years would be a bar to his right, but the enactment was not to apply where it was impossible for such person to be put in possession of the property. That is a reasonable construction of the enactment, and where there is a prior mortgage, and the second mortgagee could not get into possession, was a good illustration, and the principle applies more strongly to a reversionary interest: Wheeler v. Howell (\*). In Bowyer v. Woodman (\*), where there was a mortgage by husband and wife of her reversionary interest in money payable out of land, the same learned Vice-Chancellor held that no more than six years' interest could be recovered. No doubt the decision in that case was in conflict

<sup>(</sup>¹) 8 K. & J., 198. (²) Law Rep., 1 Eq., 418.

<sup>(\*)</sup> Law Rep., 13 Eq., 327.

<sup>(4)</sup> Law Rep., 14 Eq., 507.

<sup>(5) 8</sup> K. & J., 198, 201. (6) Law Rep., 3 Eq., 313.

146] with that in \*the case of Wheeler v. Howell ('), which was not cited. It does not seem to have occurred there to anybody that the mortgage was of a reversionary interest. [They also referred to Sinclair v. Jackson (').] The statute was not intended to apply to a case of this kind at all, because this was a mortgage of residue, and it was a mere accident upon what security it happened for the time being

to be invested. W. Pearson, Q.C., for the trustees: The question which has arisen comes under the 40th section, it being a legacy, if it does not under the 42d. This sum, however, of £3,000 was a charge upon land, and the assignment by the mortgagor (Hill) was not of the £3,000 as part of the residuary estate of Alice Ward, but of the £3,000 secured by the indenture of mortgage of April, 1824, of certain real estate. The words of the 42d section are, "no arrears of interest in respect of any sum of money charged upon or payable out of any land shall be recovered by action but within six years;" and this was money charged upon or payable out of land. It was assigned as a charge upon land, and it remained so until May, 1877. It was long after this administration action was commenced that the property and mortgage was sold by the mortgagor and the £3,000 paid It was upon the very terms of the indenture money charged upon that property, and therefore within the 42d section, and interest for six years only could be recovered. The only thing contemplated by the proviso was where an estate was mortgaged first to A. and then to B., and A. was in the actual possession, the statute should not run as against B. so long as A. was in possession. B.'s right to recover possession was to commence to run when the prior incumbrance went out of it, but the proviso did not interfere with the prior enactment, which was sweeping in its terms that no more than six years' interest should be recovered. Wheeler v. Howell was the case of an annuity, and has no application to a mortgage at all. The 42d section does not apply to an annuity in the least. Bowyer v. Woodman (\*), decided by the same learned judge, is really the case which 147] governs this one. That was the mortgage of \*a legacy which was charged upon land. It was a distinct case of land mortgaged as here, but only six years' interest was allowed. The decision in Sinclair v. Jackson (\*) may also be relied upon by the trustees. The mortgagee (plaintiff) might have exercised his power of sale, got in his money, and paid

<sup>(1) 3</sup> K. & J., 198.

<sup>(2) 17</sup> Beav., 405, 410.

<sup>(8)</sup> Law Rep., 3 Eq., 313.

off the arrears of interest. The only thing which Wheeler v. Howell(') decided was that the capital of a legacy might be recovered after twenty years. The plaintiff is entitled

to only six years' interest.

Hastings, in reply: Even in the absence of authority, the principle of the statute is that the 42d section does not apply to a case of this kind. That principle is that if a person cannot obtain possession of the rents and profits he shall be protected. That is a fair construction of the section, and the decision in Wheeler v. Howell was based upon it.

HALL, V.C.: The question which has been argued as to the application of the statute 3 & 4 Will. 4, c. 27, to this case, the property mortgaged being a reversionary interest,

is not, upon the authorities, in a satisfactory state.

I find, though counsel have not referred to the case, that the point was considered by Lord St. Leonards, in 1844, in Vincent v. Going (\*). In that case a judgment was recovered, and the property which it was desired to make available to satisfy it was a reversionary one, but there had been a tenancy for life during a considerable time, which continued while the judgment was a charge upon the property, and it was contended that the interest could be claimed by reason of the existence of the prior life estate. The Lord Chancellor, observing upon the case, said: "It is clear that it is not within the exception of the act. The exception is where a man has an estate and there are several incumbrancers on it, and one of the incumbrancers enters into possession, there another creditor shall not be prejudiced by that possession if he come for relief within a year after the prior creditor has been removed from \*the possession. [148 That is a fair and just provision. But this is a case of a a wholly different nature, for here there was an estate for life not bound by the judgment, and a remainder (which I may consider as a remainder in fee) which was bound by the judgment; and the receiver appointed in 1839 was a receiver over the life estate in respect of a charge affecting The case, therefore, is not within the exception, for the judgment creditor of the remainderman had no right to enter into possession of the estate during the life of the tenant for life, even supposing the possession had been vacant. The simple question is whether or not a judgment creditor of a remainderman in fee is entitled to recover out of the lands the arrears of interest which accrued due for any period, however long, during the existence of the tenancy

The act of Parliament is very express that he shall not be entitled to recover interest upon his judgment but within six years after it becomes due or an acknowledgment has been given. The act does not say that if he could have had a remedy against the lands and neglected to avail himself of it, he shall only recover six years' interest thereout; but it is absolute and positive that no arrears of interest shall be recovered but within the time specified, and then the exception states the only case in which the Legislature intended to relieve the creditor from the effect of the previous enactment. I am therefore inclined to think that the report is right. I will, however, consider the matter before I pronounce my decision." Then on a subsequent day he said, after referring again to the statute, that the creditor gets all that he is entitled to. "The exception in the statute is merely that while a prior incumbrancer is in possession his possession shall not prejudice a subsequent incumbrancer who is waiting, and who comes in in reasonable time to make the fund available for the payment of his de-I am not embarrassed by the provisions of the 3d section of the 3 & 4 Will. 4, c. 42, for this is a proceeding upon a judgment, not upon a bond or covenant. I must say that it is most desirable that the Legislature should clear up the difficulties which they have themselves created. for it seems difficult to reconcile the two statutes."

It seems, therefore, to me that that is a direct decision by Lord St. Leonards on the point, and in the year 1844. That case is not, I think, referred to in any of the subsequent 149] cases, and that is \*rather remarkable. The next case, Sinclair v. Jackson (1), was decided in 1853, and it is a direct authority upon the point to the same effect. reason given in that case in reference to foreclosure I agree It does not seem to show that the right of foreclosure ought to affect the question of whether more or less arrears of interest should be recoverable. If the mortgagee forecloses there is no doubt he could then sell, if he thought fit. the property as his own, and seek to get whatever the reversion would produce. However, there is the authority of Sinclair v. Jackson. The other two authorities are Wheeler v. Howell (\*) and Bowyer v. Woodman (\*). I consider that the judgment of the Vice-Chancellor in Wheeler v. Howell is a decision the other way upon the point. It is very shortly put, as it merely shows that the statute does not apply to arrears of an annuity charged upon a reversionary interest on land, so long as the interest continues to be

<sup>(1) 17</sup> Beav., 405.

<sup>(\*) 3</sup> K. & J., 198.

<sup>(8)</sup> Law Rep., 3 Eq., 313.

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That is all the judgment upon the question. reversionary. It was said in reference to that case that it does not apply at all, as it may have been decided upon the 40th section and not upon the 42d, but I do not agree with that observation. I think the case was decided upon the 42d section. It may be that it was not within that part of the 42d which deals with arrears of interest in respect of any legacy, but it is within that part of the section which says no arrears of reut shall be recoverable "for rent" which by the interpretation clause is considered to mean annuity; therefore it is clearly within that, and the argument proceeded upon it.

That case, therefore, is an authority upon the point.

With regard to the other case of Bowyer v. Woodman, which was a decision of Vice Chancellor Wood the other way—I do not think I can put it in competition with his previous judgment, as I do not think the point there was really very much before the court—the question considered and decided being simply whether, having regard to the interest being that of a married woman, it was, under the circumstances, an interest in land which could be dealt with under the statute, and it being held that it was an interest in land which could be dealt with under the statute, it was next said that no more than six years' interest could be claimed. That case was \*not like the one now before the court, as it was the case of a reversion in lands devised to trustees upon trust to sell, and that was unquestionably an interest And it had been held before that such an interest might be dealt with by a married woman by levying a fine. In this state of the authorities on that part of the case, I should consider myself, having regard to the express decision of Lord St. Leonards after the question was fully argued and considered; to the case before Vice-Chancellor Wood, where the question was not so fully considered; and to the case before the late Master of the Rolls, bound to hold that the arrears would not be recoverable while this property was reversionary. Though that is, as I consider, the state of the law upon this question, I must at the same time express my regret that it is so, because the reason and purpose of the exception and proviso in the 42d section are a reason and purpose which apply in fact to such a case as that of a charge upon a reversion where there is a preceding It is only that the statute has not carried that life interest. out. It has only provided for one case, and not for the other cases which are equally within the principle of the proviso.

Upon the other point, however, I think that this is not an 25 Eng. Rep.

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interest in land within the meaning of the 42d section. The property mortgaged was the reversionary interest of the mortgagor, derived under a trust for him of the residuary personal estate of the testatrix. Her residuary personal estate happened to consist partly or wholly, it is quite immaterial which for this purpose, of the sum of £3,000, invested upon mortgage. The trusts of her will were such as did not necessarily keep the £3,000 as a separate part of her residuary estate. Under those trusts the investments might have been varied, and independently of the trusts the position of the fund might have been altered by reason of the mortgagor paying off the mortgage; so that it was a fluctuating, or a possibly fluctuating, investment, as it might have been varied from time to time. The mortgagor mortgaged his interest in that sum, that is to say, the fund itself in its then state of investment. That mortgage would have been perfectly effectual against any security whatever on which the estate might happen to be invested at the time that it became available, and it appears to me that it is not a fair construction of the 42d section of the statute to treat 151] that \*as a mortgage of an interest in land so as to fall within the section, it being clear that mortgages or securities upon general personal estate, or upon other than that which is properly within the terms of the section, are not within the scope of that provision. Therefore I hold upon that ground that the mortgagee is entitled to be paid in full all the arrears of interest.

The trustees must be paid their costs out of the fund, and the residue must be paid to the plaintiff in accordance with the summons.

Solicitors: Learoyd, Learoyd & Peace; Pitman & Lane, agents for Markland & Davy, Leeds.

[9 Chancery Division, 151.]
V.C.H., June 3, 20, 1878.
GEE V. MAHOOD.
[1871 G. 104.]

Annuity—Corpus or Income—Direction to set apart Investments to produce Annuity—Bequest of Residue—Deficiency of Income—Annuilant not entitled to Corpus.

Testator empowered his trustees to make demises of his estate or part of it for building purposes, and also to sell all his residuary real and personal estate and to invest the proceeds, and directed them to set apart a sufficient portion of such investments to produce an annuity of £1,200, which he bequeathed to his wife for her life, payable quarterly, and he gave the entire residue of his estate after his wife's

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death for the benefit of his children. The income of the property was not sufficient to provide for the widow's annuity:

Held, that the widow was not entitled to have the deficiency raised out of the corpus of the trust cetate.

FURTHER consideration and petition. Robert Gee, who died in July, 1869, by his will made in September, 1868, after appointing his wife and two other persons trustees, and giving his household effects and other things, and a sum of £1,200 Consols to his wife, an annuity of £20 to Mary T. Drabble, and all his estate situate at Norwood to his wife, gave all other his real estate, and the residue of his personal estate, to the trustees upon trust to receive the income. The testator then empowered the trustees to make demises of his estate, or part thereof, for terms of years for building purposes, and also at such \*times as they thought proper, [152] during the widow's life, to sell and dispose of his real and personal estate, and directed them to invest the proceeds, as in the will mentioned, upon further trust "to set apart a sufficient portion of such investments as will produce the annuity of £1,200, which I bequeath to my wife for her life, pavable quarterly." The testator directed such annuity, in case of his wife's second marriage, to be reduced to the annual sum of £150 instead of the sum of £1,200, and the investment so set apart to be reduced accordingly. And subject to such investment in favor of his wife, in trust to set apart £5,000 other part thereof for his daughter, the plaintiff, Zara Gee, on her attainment to the age of twentyone years or marriage, which should first happen, to be settled upon her, and in case of her marriage, upon her and her children, as the trustees for the time being should by deed declare. "And as to the entire residue of my said trust estate, and also as to that part thereof set apart in favor of my said wife, after her death, and as to such part thereof as should be no longer required to be set apart in consequence of her second marriage," in trust as to one moiety thereof for the three children of his daughter Jane T. Carmichael, equally, with other trusts in case of their dying under the age of twenty one years and without having been married, and as to the other moiety for the benefit of his daughter Zara Gee and her children. The bill was filed in June, 1871, by the daughter Zara Gee, who was at that time in her twenty-first year, for the administration of the trusts of the will.

The widow had not married again.

The yearly income of the trust estate did not amount to £1,200, and the principal question now was whether the

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widow was entitled to have the deficiency raised out of the

corpus of the trust estate. Dickinson, Q.C., and W. W. Cooper, for the plaintiff, after stating that there were two questions for consideration -First, whether the gift of £5,000 to the daughter Zara was absolute upon her attaining the age of twenty-one years, or when she married, In re Dowling's Trusts ('); and, secondly, whether the \*widow was entitled to have the deficiency in the income raised to £1,200 a year out of the corpus—referred to the cases of Bright v. Larcher (\*), In re Tootal's Estate (\*), In re Mason (\*), May v. Bennett (\*), Mills v. Drewitt (\*), Birch v. Sherratt (\*), Wright v. Callender (\*), and Michell v. Wilton (\*); and submitted that upon these authorities the distinction which had been taken was now well and clearly established, and it was,—that if the annuitant was really a legatee of the annuity, then that legacy must be paid in full out of the fund which was a means to an end, i.e., out of the general residue of the testator's estate; but if a fund was created, not for the purpose of paying an annuity, but for the purpose of giving to A. a life interest in the fund, with the remainder to B., then all that A. could get was a life interest, although the testator might have pointed out how the fund should be invested, for the purpose of producing a certain amount of income. In this case there was, not only upon the true construction of the will, but by the express words of it, not merely a trust to hold the investments for the widow for life and for others after her death, but the testator bequeathed the annuity for her use, and made provision for the payment of it as a legacy; therefore, notwithstanding the case of Baker v. Baker (" which might be quoted against her, the widow was entitled to have her annuity of £1,200 made up out of the corpus.

Farwell, for an incumbrancer, referred to the case of Bell

v. Bell (11).

Maidlow, for the defendant Mahood.

W. Pearson, Q.C., and V. Hawkins, for the Carmichael family: There was not an absolute and imperative trust to convert, but the trustees were to sell at such times as they thought proper during the widow's life, and invest the pro-154] ceeds upon the trusts, \*and then to set apart a suffi-

- (1) Law Rep., 14 Eq., 463. (2) 3 De G. & J., 148. (3) 2 Ch. D., 628, 633; 17 Eng. R., 650.
- (4) 8 Ch. D., 411, ante, p. 380.
- (b) 1 Russ., 370.
- (6) 20 Beav., 632.

- (1) Law Rep., 2 Ch., 644.
- 8) 2 D. M. & G., 652. (\*) Law Rep., 20 Eq., 269; 13 Eng. R., 789.
  - 10) 6 H. L. C., 616.
  - (11) 6 Ir. Rep., Eq., 239.

cient portion of the investments. There was a clear and distinct gift of the residue, Baker v. Baker (') and Tarbottom v. Earle (') governed this case, and Michell v. Wilton (') and In re Tootal's Estate (') had no application to it. The only question was, under which class of cases did the present fall? The application of the income of the unconverted estate was the primary fund, and the trustees could not, until they in their discretion had converted, make the investments and set apart anything to provide for the widow. vestments were specifically given over, and the widow ought not to be allowed to take anything more than the income of the investments and property. The widow was to be permitted to enjoy the investments during her life, and upon her death they were to be divided in a particular manner, and the court ought not to destroy that property of which the widow was to have the income only, and which the testator had given to others.

*Dickinson*, in reply.

HALL, V.C.: In my opinion the widow is not entitled to have the deficiency of income to pay her £1,200 a year raised out of the corpus. The testator directed the proceeds of conversion and collection of all his real estate and residuary personalty to be invested in certain specified investments. and then declared that the trustees should set apart a sufficient portion of such investments as would produce the annuity of £1,200, which he bequeathed to his wife for her life, payable quarterly; and, subject to such investments. to set apart £5,000, other part thereof, for his daughter; and as to the entire residue of his trust estate, and also as to that part thereof set apart in favor of his wife after her death, certain trusts were declared. It appears to me that the will in this case is substantially undistinguishable from the will of the testator in the case of Tarbottom v. Earle, in which Vice-Chancellor Stuart held that the corpus could not be re-The case of Baker v. \*Baker (') seems to [155] sorted to. be also a case which requires me to hold that the widow is not entitled to resort to the corpus. In that case the annual sum was in the residuary gift mentioned as an annuity, but Sir George Turner, when the case was before the Lords Justices ('), did not consider that sufficient to give to the person entitled to the annual sum all the rights of an ordinary annuitant, and I do not think that in the present case the particular words, "annuity of £1,200

<sup>(\*) 6</sup> H. L. C., 616. (\*) 2 Ch. D., 628, 638; 17 Eng. R., (\*) 11 W. R., 680.

<sup>(</sup>a) Law Rep., 20 Eq., 269; 13 Eng. R., 789. (b) 7 D. M. & G., 687.

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V.C.H. which I bequeath to my said wife," are sufficient for that purpose. They appear to me to be only language employed to create one of several trusts declared of the proceeds of conversion and collection of the realty and residuary personalty. In Baker v. Baker the direction to pay was to pay the dividends, interest, or annual income. the trust is to pay the annuity of £1,200, but such payment is to be by means of there being set apart a sufficient portion of the investments to produce the annuity of £1,200 a year, which, fairly interpreted, is a direction to pay with or out of the income which the appropriated investments may pro-The words, construed according to their fair and ordinary interpretation, do not mean to pay out of capital and income, or out of income and if and so far as necessary out of capital. The trust of the "entire residue . . . . and also as to that part thereof set apart in favor of my said wife after her death," is a trust in which the investments to produce the annuity are given over in their integrity "after the wife's death," not "after the satisfaction of the annuity," a distinction stated and recognized by Lord Justice Rolt in Birch v. Sherratt (1). It is to be observed in the present case that the fund set apart after the death of the wife, although given over along with the residue, is specified and described independently of it, the case being in that respect similar to that of Tarbottom v. Earle (\*) In that case the separate fund and the residue were given in two distinct sentences following each other. Here the residue and the fund are given in the same trust. This difference is, I consider, one of form only. In Wright v. Callender (') the annuity fund was directed, after the decease of the an-156] nuitant, to fall into residue, \*and was subsequently given by reference to the disposition of the residue, the residue being given to certain persons named, and the annuity fund to those of them living when the fund fell in, or the issue of those deceased. As to that case, Sir George Turner, in Baker v. Baker ('), considered that Lord Cranworth's decision in Wright v. Callender (\*) depended upon the direction to fall into residue. He says of that case, "From this disposition," i.e., the direction to fall into residue, "Lord Cranworth, as I understand his judgment, drew the same conclusion as had been drawn in May v. Bennett (\*), that

the first gift was intended to be an annuity, and then he considered that the subsequent disposition of the capital

<sup>(1)</sup> Law Rep., 2 Ch., 649.

<sup>(\*) 11</sup> W. R., 680.

<sup>(8) 2</sup> D. M. & G., 652.

<sup>(4) 7</sup> D. M. & G., 687.

<sup>(5) 1</sup> Russ., 870.

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fund evinced no intention to alter the character of the first gift." Lord Cranworth, in his judgment in Baker v. Baker ('), states what was the ground of the decision in Wright v. Callender, from which it would seem that the decision turned upon a particular intent to be collected from Independently of the appropriated fund in the the will. present case not being directed to fall into the residue, or given by reference to a disposition of residue, it may be observed that in Wright v. Callender there was a separate trust for investment of an annuity fund, whilst in the present case all the proceeds of realty and residuary personalty are to be invested, and then an appropriation is to take place; and Lord Cranworth admitted, in Wright v. Callender, that if there had been anything showing that the testator intended the fund to be continued in its integrity during the life of the annuitant, and in that state to go over, the corpus could not have been resorted to; and I would refer to the observations of Lord Chelmsford in the same case. May v. Bennett was cited on behalf of the widow. case Lord Brougham disapproved in Baker v. Baker. May v. Bennett the fund was to fall into residue, and Sir George Turner, in Baker v. Baker (\*), treats the case as depending upon that, and he treats Mills v. Drewitt (\*), which in this case was also relied upon for the widow, as decided entirely on the authority of Wright v. Callender. But this is clearly a mistake. As to Mills v. Drewitt, it must be observed that it was decided before Baker \*v. Ba- [157] ker ('). In Birch v. Sherratt ('), relied upon for the widow, there was not a separate fund provided; and as to Bright v. Larcher (\*), also relied upon for the widow, the fund to be set apart was after the death of the annuitant to be applied in the same manner as the testator had directed the residue of his personal estate to be applied, upon which the decision was rested. In the case of In re Tootal's Estate ('), also relied on for the widow, the testator, by separate introductory clauses, gave annuities, and then directed a fund to be set apart to answer the annuities, and then gave his residuary estate, including the fund set apart to answer the That case differs from the present, first, because there were separate independent gifts of the annuities, and, secondly, because the fund set apart was treated and dealt with as residue; "including" expressing that that

<sup>(</sup>¹) 6 H. L. C., 629. (²) 7 D. M. & G., 686.

<sup>(\*) 20</sup> Beav., 632. (4) 6 H. L. C., 616.

<sup>(5)</sup> Law Rep., 2 Ch., 644.

<sup>(°) 3</sup> De G. & J., 148.

<sup>(†) 2</sup> Ch. D., 628.

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fund was given as being comprised in the residue. It does not appear to me that the £5,000 being given "subject to such investment in favor of my said wife" is in favor of the wife's claim. On the contrary, "subject to such investment" would seem to limit the wife to the investment. The words "subject to the payment of the annuity" might have a different operation. In Birch v. Sherratt Lord Justice Rolt said ('): "If an annuity is given out of rents and profits, or dividends and interest, and the capital or corpus is given intact from and after the annuitant's death to another, the case is equivalent to the case of a life interest with remainder over. But if the capital is given over, not 'from and after the annuitant's death,' but 'from and after satisfaction of the annuity and subject to the annuity,' then I think the case is equivalent to the case of a legacy and a residuary bequest, especially if the gift of the annuity itself admits of a construction charging it on the capital of the estate, or of the trust fund. This view of the principle of construction appears to me not to be inconsistent with any one of the cases which have been cited." I have not mentioned the provisions of the will reducing the wife's annuity on marriage. I have considered them, but they do not appear to me to vary the conclusion I have come to. As to 1581 the words "subject to," Mr. Farwell referred \*me to Bell v. Bell (1). The words "subject thereto" were in that case construed subject to the testator's widow receiving payment of an annuity in full, but that was because, according to the correct construction of the preceding part of the will, she was entitled to such payment. Here the words are not "subject thereto," but "subject to such investment in Those parts of the will which menfavor of my said wife. tion and make provision as to the rents and income until conversion do not seem to me to be important. I think that the widow must take whatever the income may be until conversion, and the income of the realized property for the time being up to £1,200 a year, from that source, i.e., she will not be entitled to arrears of that annual sum, but will take £1,200 a year if and when the annual income of the property, whether invested or not, will suffice to pay her that sum. In reference to the annuity fund being given over in its integrity, Lord Cottenham's observations in Foster v. Smith (') may also be referred to. There will be one order on the petition and further consideration, the costs of the petition being costs in the action.

As to the question whether the plaintiff is, having at-

<sup>(1)</sup> Law Rep., 2 Ch., 649.

<sup>(\*) 6</sup> Ir. Rep., Eq., 239.

<sup>(\*) 1</sup> Ph., 629.

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tained twenty-one without having married, absolutely entitled to the £5,000, or whatever, under the gift of that sum, she may hereafter be declared to be entitled to, I think it better not now to decide that question. Her rights under that disposition in other respects remain for future determination; and as she may marry and have a child, in which case such child will be heard as to whether there should be a settlement or not, I consider it more proper not to deal at present with that question.

Solicitors: Stokes, Saunders & Stokes; Hicks & Son; Billinghurst & Wood.

Testator gave a daughter a legacy of \$5,000, and a brother a legacy of \$2,000. He further directed his executor to invest a sum sufficient to pay his widow, during her life, \$200 per annum, and another sum sufficient to pay a son \$100 per annum during life. He then gave the residue of his estate to the daughter to whom he had given the \$5,000, except the principal of the two sums invested to pay the annuities to his son and widow, "which I direct to go to my heirs-at-law." The executor invested sums sufficient to produce the annuities, when there was not suffi-

cient to pay the \$5,000 legacy to the daughter and that of \$2,000 to the brother in full:

Held, 1. That on the death of the widow and the son, the principal of the sums invested to produce these annuities should be applied to the payment of the balances unpaid on the \$5,000 and the \$2,000 legacies

and the \$2,000 legacies.

2. That such legatees were entitled to interest upon the unpaid balances of their legacies, commencing one year after the granting of letters testamentary: Wilde v. Wilde, 58 How. Pr., 71.

25 Eng. Rep.

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1. By a deed of separation the husband covenanted to pay an annuity of £200 to each of his daughters during their respective lives, such annuities to cease if he should again cohabit with his wife, which event did not happen. The husband survived his wife and died intestate. In the distribution of his personal estate among his children under the Statute of Distributions:

Held (reversing the decision of Hall, V.C.), that so much of the annuities to the daughters as were paid during their father's lifetime were not in the nature of advancements; and that the value of each annuity must be estimated as at the death of the intestate, and

the amount brought into hotchpot. Hatfeild v. Minet. 180, 188 note.

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#### AFFIDAVIT.

 In an action in the Chancery Division, the plaintiff's London solicitors, who were his only solicitors on the record, employed a firm who were his country solicitors in getting up evidence. This business was done entirely by one of the partners in the country firm, but some of the affidavits filed on behalf of the plaintiff were sworn before the other partner:

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#### AGREEMENT.

1. The plaintiffs claimed £37 from the defendant for the use and occupation of a house, and authorized him to pay the amount to a person whom they named. She called on the defendant, and he then expressed his readiness to pay the amount, but she (having also an interest in the property) refused to receive it. No actual tender was made. The plaintiffs sued the defendant for the use and occupation, claiming £238. The defendant paid £37 into court:

Held, that as soon as the defendant expressed to the agent his readiness to pay the £37 there was a concluded agreement between him and the plaintiffs for that amount, and that the plaintiffs could not recover more:

2. Held, also, that the defendant was entitled to the costs of the action from the

time of the payment into court. Gretton v. Mees. 52, 54 note.

8. The defendant placed a leasehold property in the hands of a house agent for sale. The plaintiff wrote to the agent, "In reference to J.'s property in Fleet Street, I think £800 for the lease, fixtures, &c., is about what I should be willing to give. Possession to be given me within fourteen days from date. This offer is made subject to the conditions of the lease being modified to my solicitor's satisfaction." Shortly afterwards the agent wrote back, "We are instructed to accept your offer of £800 for these premises, and have asked J.'s solicitor to prepare contract." The required modification in the lease was procured:

Held, by Fry, J., and by the Court of Appeal, that, notwithstanding the reference to a future contract, the two letters constituted a complete contract. Bonnewell v. Jenkins. 128, 131 note.

- 4. A condition in a contract for sale that, if the purchaser shall make any objection or requisition which the vendor shall be unwilling on the ground of expense or otherwise to comply with, the vendor may annul the sale, does not enable a vendor to rescind the contract in a case where he fails to show any title whatever. Bowman v. Hyland.
- 5. The defendant made an offer by letter to sell an estate to the plaintiff, which offer the plaintiff accepted by letter, "subject to the title being approved by my solicitor." After this the plaintiff wrote to say that he must abandon the purchase unless he was allowed to pay the money by instalments. The defendant assented to payment by instalments. Shortly afterwards the plaintiff's solicitor brought to the defendant's solicitor a paper embodying the terms as to payment, and headed, "Proposals by T. H. for purchase of the M. Estate." The defendant's solicitor verbally agreed to these terms, and arranged to instruct his counsel to prepare an agreement on the basis of them, but no such contract was pre-The defendant having afterpared. wards declined to complete, the plaintiff brought his action for specific performance, and the defendant demurred to the statement of claim. On the argument in the court below, it was taken

for granted that the two letters made

a binding contract:

Held, by Malins, V.C., that the negotiations as to payment by instalments did not amount to an abandonment by the plaintiff of the original contract, and that the demurrer must be overruled.

- 6. Held, on appeal, that the words "subject to the title being approved by my solicitor" were not merely an expression of what would be implied by law, but constituted a new term; that the plaintiff's letter, therefore, was not an acceptance, but a new offer which had never been accepted, and that there was no binding contract.
- 7. A. wrote to B. offering to sell him an estate for £37,500, or a part of the estate for a less sum, and added a post-script reserving the right to remove the materials of a house. B. replied: "I beg to acknowledge the receipt of your letter stating that you are willing to accept £37,500 for the whole of your freehold land at N. I hereby accept your terms as above, and agree to pay you the said sum of £37,500 for your land":

Held, by Jessel, M.R., that this was an acceptance of the terms in A.'s letters, including the postscript. Hussey v. Horne-Payne. 561, 569 note.

See Arbitration, 88, 99 note. Condition, 9, 20 note. Frauds, Statute of. Settlement, 711. Ultra Vires, 574.

# AMENDMENT.

See Pleading, 55.

#### ANNUITY.

See INCOME, 850, 857 note.

## ANSWER.

See Counter-claim, 488. Pleading, 55.

#### APPEAL.

- Leave to appeal to the House of Lords refused, on the ground that the question in dispute was merely one of fact. Matter of Hayman.
- 2. A contributory, on the 29th of March, being twenty-one days from the pronouncing of a refusal to remove his name from the list, gave fourteen days' notice of appeal. On the 1st of April, conceiving that he ought to have given only a four days' notice, he withdrew his notice of appeal, and on the following day gave a four days' notice of appeal. On the hearing of the appeal, the objection was taken that it was too late:

Held, that the time ought to be extended. Taylor's Case. 539

8. A petitioner applied for payment out of court of the whole of a fund, his title to one moiety of which was not disputed. The court below ordered payment to him of one moiety only:

Held, that an appeal from this order was not an appeal from the refusal of an application, and that the time for appealing did not begin to run till the order was drawn up. Matter of Michell's Truets.

#### APPEARANCE.

 A winding-up petition having been presented by a creditor, the solicitor of the petitioner informed the secretary and one of the directors of the fact. The whole of the directors then met, the petitioner's solicitor being present, and passed resolutions assenting to the appointment of their secretary as provisional liquidator without prejudice to the right of the company to assent to or dissent from the proceedings of the petitioner, and that C., the solicitor of a mortgagee of the share capital, should be instructed to take such steps as might be necessary in the interest of the company in relation to the foregoing resolution. C. accepted service of the petition, and appeared for the company on the motion for the appointment of an interim liquidator. The petition was not served at the office of the company. Some days after this a meeting of the company was held at which resolutions were passed that the company should be wound up voluntarily, and that P., the solicitor to the company, should be instructed to carry out the negotiations as to the windingup. There was no previous resolution The petiappointing P the solicitor. tion came on to be heard before Malins, V.C., and counsel instructed by P. opposed on behalf of the company. A winding-up order having been made, notice of appeal was given by P. on behalf of the company

Heid, by Malins, V.C., and on appeal, that as service of the petition had been accepted on behalf of the company by a solicitor duly appointed for that purpose, service at the office of the company was not necessary:

2. Held, also, by the Court of Appeal, that P. had no authority to represent the company on the appeal. Matter of Re-

#### APPOINTMENT.

See TRUSTS AND TRUSTERS, 228.

APPROPRIATION See PAYMENT, 676.

# ARBITRATION.

1. The plaintiff and three other persons, G., N., and F.; all British subjects, entered into an agreement, in the Russian language and registered in Russia, to trade in copartnership in Russia, providing (inter alia) that the head office of the firm should be in St. Petersburg: and reserving to G. and N. the right to recall their capital within a year, and, if not paid within a month, the firm was to be wound up; and also providing that "all disputes, no matter how or where they shall arise, shall be referred to the St. Petersburg Com-mercial Court," whose decision shall be final. The plaintiff alleged that there was a contemporaneous English agreement, not registered in Russia, by | See Landlord and Tenant, 446, 458 note.

which G. and N. agreed to compensate the plaintiff in the event of a dissolution within a year, under the powers reserved to them. The two partners exercised their right within the year to recall their capital, and immediately took steps to wind up the partnership in Russia. The plaintiff having thereupon commenced an action in England, alleging that the proceedings of his co-partners, the defendants, were taken without his knowledge and sanction, and were invalid and not binding on him, and claiming a dissolution of the partnership, relief in respect of the English agreement, the appointment of a receiver and other relief, the defendants moved for a stay of proceedings in the action and a reference to the St. Petersburg Commercial Court:

Held, that an agreement to refer all disputes to a foreign court is within the 11th section of the Common Law Procedure Act, 1854, and that the defendante were entitled to an order on their motion; and that, although the court had jurisdiction to appoint a receiver pending a reference to arbitration, it was not proper to do so unless a special case was made, as the course of liquidation before the tribunal chosen by the parties themselves would thereby be interfered with.

- 2. Semble, if a sufficient case were shown for granting an injunction, the court would not stay proceedings. Law v. 88, 99 note. Garrett,
- The court will, by injunction, restrain an arbitrator from acting, in any case in which he is, in the opinion of the court, unfit or incompetent to act. Beddow v. Beddow.

#### ARREST.

See IRREGULARITY, 72.

# ASSENT.

See AGREEMENT, 52, 54 note; 561, 569 mole.

#### ASSIGNEE.

#### ASSIGNMENT.

See VENDOR AND VENDEE, 350, 354 note.

#### ASSIGNS.

See COVENANTS, 827, 882 note.

# ATTORNEY.

See Affidavit, 5, 8 note. Appearance, 182, Stay, 551.

## ATTORNEY'S LIEN.

See SET-OFF, 215, 217 note.

#### AUCTIONEER.

See FRAUDS, STATUTE OF, 430, 432 note.

# AUTHORITY.

See APPEARANCE, 182.

# B.

# BANKRUPTCY.

1. The creditors of a debtor who had filed a liquidation petition resolved to accept a composition of 15s. in the pound, payable in four instalments, to be secured by the joint and several promissory notes of the debtor and a surety. The resolution was registered, and the receiver who had been appointed gave up possession of the estate to the debtor. The promissory notes were delivered to the creditors. When the first instalment became due neither the debtor nor the surety could pay it. Two days

before it became due the debtor's solicitor applied to the court for leave to summon a meeting of the creditors for the purpose of submitting a resolution to vary the provisions of the composition. Leave was given, but the receiver was reappointed. A meeting was held, and it was resolved to accept a composition of 8s. in the pound, payable in three instalments, the second and third of which were to be guaranteed by sure-ties. The resolution was confirmed at a second meeting, but registration was refused, and the debtor was adjudicated a bankrupt. The debtor's solicitor applied to the court to order the costs of the abortive proceedings to reduce the composition to be paid out of the bankrupt's estate, but the application was refused in the county court and afterwards by the Chief Judge:

Held, that the abortive proceedings were not "pending" at the time of the bankruptcy, within the meaning of rule 292 of the Bankruptcy Rules, 1870, and that at any rate the exercise by the county court of the discretion given to it by the rule ought not to be interfered with; and that the proceedings to reduce the composition were not authorized by the 6th clause of sect. 126 of the Bankruptcy Act, 1869. Matter of Hopper.

2. A company was sued in an action under the Bills of Exchange Act, and the plaintiff, in consequence of repeated applications by the secretary and solicitors of the company, postponed proceedings in the action, and ultimately signed judgment and issued execution; a petition for winding up was presented, on which an order was afterwards made; the creditor lodged the writ on the day of presentation of the petition, and on the next day the sheriff seized and was in possession:

and was in possession:

Held, that the postponement of the proceedings in the action having been caused by the applications made on behalf of the company for time, the creditor was entitled to the benefit of his judgment in priority to other creditors:

- Held, also, that the right of the execution creditor was not affected by the 10th section of the Judicature Act, 1875.
- Form of order.
- 5. In an action by another creditor, also under the Bills of Exchange Act, the

company obtained leave to appear and defend, on the ground that there had been irregularity in regard to the bill of exchange, and that the plaintiff had not paid the full amount for it. On application for further time to proceed with the defence, statements were made bona fide by the solicitor's clerk as to the solvency of the company and the improbability of a winding-up petition, and further time was given, and ultimately, the orders not having been complied with, the action proceeded. Two days after the presentation of the petition judgment was signed in the action and execution issued:

Held, that the creditor was not entitled to the benefit of his judgment, and that he must come in and prove his claim in the winding-up. Matter of Railway, etc., Co. 215

6. One of the terms of an engineering contract was that the plant brought by the contractor on to the works should "be deemed the property of" the employers "for the time being," and should "not be removed during the progress of the work without the written order of the engineer," and that in case of suspension of the works by the engineer for any act or default of the contractor, the same should be "subject to be used" in and about the completion of the works. The works were suspended by the engineer, the contractor went into liquidation, and the works having been completed by the employers, the plant was by consent sold:

Held, that the plant did not become the property of the employers, and that the user of the materials by the employers after the suspension of the works was not such a "dealing" within the meaning of the 39th section of the Bankruptcy Act, 1869, as that the employers were entitled to set off the value of the plant against the sum due to them from the contractor for breach of the contract. Matter of Winter. 240

7. Where creditors agree to accept a composition payable in instalments, some of which are guaranteed by a surety, if default is made in the payment of any one instalment the creditors have a right to sue the debtor, or to prove in his bankruptcy, for the balance of their original debts, after deducting what they have received, either from the

debtor or the surety, in respect of the composition, and not merely for the amount of the unpaid instalments of the composition.

- 8. And the surety, though he is entitled to prove in the debtor's bankruptcy for what he has paid in respect of the composition, has no right to put the creditors to an election whether they will carry out the composition arrangement in toto or reject it in toto.
- 9. The words "notice of an act of bankruptcy available for adjudication" in
  sects. 94 and 95 of the Bankruptcy Act,
  1869, mean notice of an act of bankruptcy which would have been available for the making of the adjudication
  actually made, that is, an act of bankruptcy committed within six months
  from the presentation of the petition
  on which the adjudication was founded.
  Matter of Gilbey. 252, 258 note.
- 10. A judgment creditor, who, before the filing of a liquidation petition by his debtor, has obtained a garnishee order wisi attaching debts due to the debtor, is a secured creditor within the meaning of sects. 12 and 16 of the Bankruptcy Act, 1869, and is, therefore, entitled to the attached debts as against the trustee in the liquidation, even though they did not become actually payable until after the commencement of the liquidation. Matter of Joselyme.
- Under the Bankruptcy Act, 1869, as before it, damages in an action for a personal tort recovered by an undischarged bankrupt do not pass to his trustee.
- 12. Though, if the bankrupt had accumulated the money and invested it in property, the trustee might be entitled to the property, yet he cannot intercept the damages or prevent the bankrupt from expending them in the maintenance of himself and his family. Matter of Vine.
- 13. The Court of Bankruptcy, even if it possesses jurisdiction under sect. 72 of the Bankruptcy Act, 1869, to enforce a simple money demand by the trustee of a bankrupt's property against a third party (as to which quarre), ought not to

exercise the jurisdiction, but ought to leave the demand to be enforced by the trustee in an action in the ordinary

14. Commission agents accepted bills drawn upon them by their principals for part of the value of goods consigned to the agents for sale. After the principals had filed a liquidation petition the agents sold the goods in order to reimburse themselves the amount of one of the bills which they had paid, and to provide funds to meet the others which were soon to become due. Before the latter bills were paid the agents filed a liquidation petition. They had spent all the proceeds of the sale. Their creditors agreed to accept composition, which was paid to the holders of the bills, some of whom claimed to prove in the liquidation of the principals. The principals' trustee applied to a County Court in Bank-ruptcy for an order that the agents should pay to him the balance of the proceeds of sale, after deducting the amount of the bill which they had paid in full, and the composition which they had paid in respect of the others:

Held, by the Chief Judge (reversing

the decision of the County Court Judge). that the trustee was not entitled to the

order.

- 15. Held, by the Court of Appeal, that the trustee's demand against the agents was a mere demand for a debt due to the principals' estate, and that the Court of Bankruptcy ought not to assume jurisdiction to try it. Matter of
- 16. A policy of life assurance is a "thing in action," and is therefore excepted from the operation of the reputed ownership clause, sect. 15, of the Bank-ruptcy Act, 1869. Matter of libetson.
- 17. The rule in bankruptcy by which Bankruptcy Act, 1869, s. 87) an execution creditor for more than £50 loses the benefit of his execution if the sheriff, within fourteen days after a sale, has notice of bankruptcy, applies, under sect. 10 of the Judicature Act, 1875, to a company in liquidation.
- 18. The solicitors of a company, being its creditors for more than £50, issued a 25 Eng. Rep. 109

writ of execution against the company, and on the 20th of December, 1875, lodged it with the sheriff, who thereupon took possession. On the 28d of December a winding-up petition was presented, the company's solicitors being solicitors to the petitioner, and on the 15th of January, 1876, a winding-up order was made, under which the sheriff withdrew, and the company's property was ordered to be sold by the liquidator, but it was declared that the execution creditors should have the same priority against the proceeds of the property as they would have had if it had been sold by the sheriff.

- 19. The property having been sold by the liquidator, but the proceeds being insufficient for payment of the com-pany's debts, the execution creditors applied by summons to have their debt paid in priority to the other creditors. Matter of Printing, etc.
- 20. A sheriff's officer seized the goods of a trader debtor under a f. fa. for more than \$50, and advertised them for sale. Before the sale could take place the debtor filed a petition for liquidation, and the trustee obtained an injunction restraining the sale, and possession was then given up. Upon the appliwas then given up. Upon the application of the sheriff for his expenses:

Held, that the facts of there having been no sale, and the liquidation of the debtor, did not affect the right of the sheriff to be paid by the trustee the necessary expenses of possession and of preparing for sale. Matter of Craycroft.

- 21. By virtue of sect. 82 of the Bankruptcy Act, 1869, the old rule in bankruptcy, that debts arising upon voluntary bonds or covenants of a bankrupt are to be postponed in the receipt of dividends to debts for valuable consideration, has been abolished.
- 22. All debts, except those to which by sect. 82 priority is expressly given, are now entitled to receive dividends pari passu. Matter of Pottinger.
- 28. A debtor filed a liquidation petition on the 14th of September, and on the 3d of October a trustee was appointed. On the 26th of November the creditors resolved that the trustee should sell the debtor's estate for a sum sufficient to

pay the creditors 4s. in the pound; | See Landlord and Tenant, 525. that the debtor's discharge should be granted on the filing of the trustee's certificate that the provisions of this scheme of settlement had been complied with; and that the close of the liquidation and the release of the trustee should take place on and from the 28th of January. On the 4th of January these resolutions were approved by the court. The debtor was tenant of some business premises and some chattels for a term which expired on the 25th of December. The trustee the 25th of December. took possession of the premises and the chattels, and remained in possession of them until the expiration of the term, but he did not pay the landlord the quarter's rent which fell due on the 25th of December. On the 26th of February the landlord applied to the Court of Bankruptcy for an order directing the trustee to pay him that quarter's rent. There was evidence that several applications had been made to the trustee for the rent in the course of January, and that he had said that he had left money with the debtor to pay it:

Held, that either the landlord's remedy was a personal one against the trustee, in which case the Court of Bankruptcy had no jurisdiction in the matter, or that, if there was a remedy in the Court of Bankruptcy, the trustee had done nothing more than commit a default in the administration of the assets, from liability for which he was protected by the release, there being nothing to show that there had been any fraud in obtaining it.

- 24. Sect. 53 of the Bankruptcy Act, 1869, applies to a release given by the creditors to the trustee under a liquids-Matter of Cartion by arrangement. ter.
- 25. The provisions for the protection of a debtor in sect. 12 of the Bankruptcy Act, 1869, and rule 289 of the Bankruptcy Rules, 1870, do not apply to composition.
- 26. After the registration of composition resolutions the composition proceedings are no longer pending. Pashler v. Vincent. 707

See Corporations, 272. ELECTION, 691.

PARTNERSHIP, 87, 283, 691, 706 note. TITLE, 194.

#### BENEVOLENT SOCIETY.

1. Upon the sale of land belonging to a company of the nature of a voluntary society, with no rules or provisions as to the disposition of its property:

Held, that the members of the company for the time being were entitled to divide the proceeds in equal shares. Brown v. Dale.

See Building Society, 824, 826 note,

# BILL OF PARTICULARS.

See DISCOVERY, 782.

#### BONA FIDE.

- 1. An agreement in writing to execute on request an effectual mortgage of a policy of assurance deposited at the time of the agreement as security for a loan, is not an "assignment" of such policy within the meaning of the Poiicies of Assurance Act, 1867.
- Accordingly, notice to the Assurance Company of such an agreement does not give under that act any priority over a prior equitable mortgagee who has given no notice but has possession of the policy.
- 8. The holder of a policy of assurance on his own life deposited it with A. by way of equitable mortgage to secure a A. retained the policy, but gave no notice to the company.

B. afterwards, in ignorance of this prior mortgage, agreed to lend money to the policy holder upon a deposit of the same policy, and the policy holder. alleging that he had left the policy at home by mistake, and promising forthwith to deliver it to B., took the loan and signed a memorandum that he had deposited the policy with B., and that 78

he undertook on request to execute to Arbouin, Matter of, 1 De G. Bankr. B. an effectual mortgage of it. 859, explained.

B. gave to the company notice of his loan and memorandum of deposit, and frequently applied to the policy holder for the policy, but the policy holder made various excuses for not handing it over, and died leaving it in the possession of A.:

Held, that the circumstances of the case were such as to put B. on inquiry at the time of the loan, and to fix him with constructive notice of A.'s security, and that the title of A., as in possession of the policy, must prevail over that of B., although B. did and A. did not give notice to the company. Spencer v. Clarke.

See FRAUDULENT TRANSFERS, 312, 320 note.

#### BOND.

1. When illegal and void.

# BOUNDARIES.

See Equity, 72, 77 note.

#### BUILDING SOCIETY.

- Fines secured by covenant in a mortgage to a building society form part of the principal in taking the account of principal, interest, and costs in a foreclosure suit by the building society, and are payable with interest.
- The form of foreclosure decree in the case of a mortgage to a building society does not differ from that in the case of an ordinary mortgage. Provident, etc., v. Greenhill. 824, 826 note.

## C.

CASES AFFIRMED, REVERSED, OVERRULED, AND CONSIDERED.

Acton v. Woodgate, 2 Myl. & K., 492, followed. 627
Albion Steel, etc., Matter of, 7 Chy. Div., 547, explained. 459

859, explained. Carter v. Bentall, 2 Beav., 551, considered. Crowe v. Barnicott, 23 Eng. Rep., 814, distinguished. 72 Dorman, Matter of, L. R., 8 Chy., 51 followed. 234 Drinkwater v. Ratcliffe, L. R., 20 Eq. 528, discussed. Ellis's Trusts, Matter of, 9 Eng. Rep. 611, considered. Emanuel v. Bridger, L. R., 9 Q. B., 286, followed. 822 Garrard v. Lauderdale, 2 Russ. & Myl., 451, followed. 627 Governors, etc., v. Knotts, 22 Eng. R. 14, reversed. 601 Greenway, Matter of, L. R., 16 Eq., 619, disapproved. Hall, Matter of, 10 Week. R., 87, con-778 sidered. Howe v. Earl of Dartmouth, 7 Vesey, 187, followed. Jeffery, Matter of, L. R., 9 Chy., 144, distinguished. Job v. Job, 23 Eng. Rep., 162, explained. 892 Lambe v. Eames, L. R., 6 Chy., 597 followed. **4**59 angridge v. Payne, 2 J. & H., 423, con-218 sidered. Lawes v. Bennett, 1 Cox's Chy., 167, considered. Leach v. Jay, 23 Eng. R., 106, affirm-Lowe v. Blackmore, 14 Eng. Rep., 291 followed. 322Magdalen Hospital v. Knotts, 22 Eng. R., 14, reversed. 6Ō1 Michell's Trusts, Matter of, 23 Eng. R., 224, reversed. 711 Moet v. Pickering, 23 Eng. Rep., 834, reversed. 356 Powell, Matter of, 1 Chy. Div., 501, followed. 510 Prager, Matter of, 8 Chy. Div., 115, distinguished. 620 Reynard v. Arnold, 7 Eng. Rep., 738. affirmed L. R., 10 Chy., 386, distinguished. Reynolds v. Bowley, L. R., 2 Q. B., 474, distinguished. Rossiter v. Miller, 22 Eng. Rep., 882 distinguished. 128 Rossiter v. Miller, 24 Eng. Rep., 684, 128 distinguished. Rowland, Matter of, L. R., 1 Chy., 421 explained. 87 Ryall v. Rowles, 1 Ves, Sen., 375, considered. 234

Saunders v. Jones, 7 Chy. Div., 435 overruled. Sherman v. British, etc., L. R., 14 Eq. 4, discussed. Sheen, Matter of, 22 Eng. Rep., 781 87 explained. Sinclair v. Jackson, 17 Beav., 405, con 843 sidered. Socièté Cockrill, Matter of, 3 Chy. Div., **62**0 115, distinguished. Spargo's Case, 5 Eng. Rep., 626, dis-174 tinovished. United Kingdom, etc., Matter of, 34 Beav., 493, considered. 778 Upmann v. Elkan, 1 Eng. R., 474, ques-856 tioned. Vincent v. Going, 1 J. & Lat. 697, con-848 sidered. Webb's Policy, Matter of, L. R., 2 Eq.,
456 considered. 456, considered. Wheeler v. Howell, S K. & J., 198, con-848 sidered. Wyth v. Blackman, 1 Ves. Sen., 197, considered. 888

#### CHARGE.

See LEGACIES, 848.
LIFE ESTATE, 881.
PARTNERSHIP, 288.

#### CHARITY.

- A gift by will of money for the "support" of a school does not necessarily imply that the money is to be "laid out or disposed of in the purchase of any lands, tenements, or hereditaments," so as to render the gift void under the Mortmain Act (9 Geo. 2, c. 36).
- 2. A testator bequeathed a sum of money to trustees to be applied by them in "supporting or founding" free or ragged schools for poor children in a particular parish. For some years prior to the date of the will and down to the testator's death there existed in the parish a school for the children of the poorest inhabitants, the testator being its principal supporter. It was held in a hired room, the rent of which was paid by the testator, who also paid the teacher's salary:

Held,-reading the will as creating

- an alternative trust,—a good charitable gift. Morley v. Crozon. 191
- 3. Although sect. 17 of the Charitable Trusts Act, 1853, does not prohibit charity trustees from paying their trust fundinto court under the Trustee Relief Act, and thereby relieving themselves from further liability and putting an end to their trust, it is irregular for them to follow that step up by presenting a petition for the administration of the charity funds. In all cases of doubt or difficulty as to the administration of the fund the trustees should apply to the Charitable Trusts Act before taking any legal proceedings with reference to the fund:
- 4. Semble, in settling a scheme for the regulation of the funds of a charity school on its transfer to a school board, care should be taken to provide that the funds shall be applied for the advancement of learning in the school—as for instance, by establishing exhibitions or scholarshipe—and not for the general purposes of the school, which would have the effect of a grant in aid of the local rates. Matter of Poplar, stc. 465
- By the terms of a scheme, approved in 1852, for appropriation of the increased revenues of a charity estate originally applicable to the relief of the poor, it was provided that a sum of £90 should be paid by the charity trustees to the treasurer of a school association in aid of the expenses of a school in Flint Street, Walworth, "or any other school that may be established in its stead." provided that no sum should be paid to any denominational school: and that if such school should "become materially altered in discipline, number of children, or other circumstance," then the £90 should "in the discretion of the trustees" be applied "for educational purposes amongst other schools of a similar character" in the parish.

A transfer of the Flint Street School and its endowment having been made by the managers to the School Board for London:

Held, that the Flint Street School had not by the fact of such transfer become "materially altered in discipline, number of children, or other circumstance;" and that the trustees were

a year to the School Board. School Board, etc., v. Faulconer. 485

See LANDLORD AND TENANT, 601. LEGACIES, 496. WILLS, 897.

#### CHATTEL MORTGAGE

See PARTNERSHIP, 238.

#### CODE

See PRACTICE, 660.

#### COMMISSION.

- 1. An action having been brought to set aside a deed of gift made by a lady a few days before her death, on the ground that the instructions for it were given while she was in a state of stupor produced by large doses of a narcotic drug, the plaintiff exhibited interrogatories, following out in detail the statements of the claim, with a view of showing that the defendant, who was the grantee in the deed of gift, had procured the drug for her and encouraged her to take it, in order to avail himself of the stupor which it produced to obtain the execution of the deed of gift. The defendant moved to strike out the interrogatories as scandalous, irrelevant, and not put bona fide
  - for the purposes of the action:

    Held, by Bacon, V.C., that the interrogatories inquired after matters amounting to an indictable offence, and must therefore be disallowed.
- 2. Held, on appeal, that supposing the matter inquired after to be an indictable offence, that was no reason for striking out an interrogatory, which, being relevant, was not scandalous; and that the remedy of the defendant was to decline to answer, on the ground that his answer might tend to criminate him.

- bound to pay the endowment of £90 | 8. A party may decline to answer under Rules of Court, 1875, Order xxxx, rule 8, though he might have applied to have the interrogatory struck out un-der rule 5, and has not done so. The doubt in Saunders v. Jones overruled.
  - 4. The words "or on any other ground" in Order xxxI, rule 5, mean grounds ejusdem generie with those specified. Fisher v. Oven. 540

#### COMPOSITION.

See BANKBUPTOY, 252, 258 note; 707.

#### COMPROMISE.

See BANKRUPTCY, 252, 258 note. CORPORATIONS, STAY, 9, 551.

# CONDITION.

 Remedy of party who signed agree-ment on condition should be invalid until signed by others who did not sign it. Luke v. South Kensington, etc. 9, 20 note.

See Mortgage, 218, 221 note.

#### CONDITIONAL SALE.

See SALE, 510, 514 note.

# CONFUSION OF BOUNDARIES.

See Equity, 72, 77 note.

## CONSIDERATION.

See Illegal Contract, 647, 650 note. NOVATION, 627, 686 note.

CONSOLIDATION.

See Ultra VIRES, 574.

CONSTRUCTION.

See Interpretation. Wills.

# CONTRACTS.

See Agreement.
ILLEGAL CONTRACTS, 647, 650 note.

#### CONVENIENCE.

 Observations on the argument ab inconvenients in the construction of wills. Homer v. Homer.

## CONVEYANCE.

See TENANT IN TAIL, 526.

#### COPYRIGHT.

- A partial assignment of, or license to use, a design under sect. 6 of the act 5 & 6 Vict. c. 100, must be in writing, and can only be made by a registered proprietor.
- 2. By a verbal contract made in July, 1877, C., an American manufacturer, purported to sell to the plaintiff the exclusive right to sell in England an article newly designed and then about to be manufactured, and also to obtain such protection for the same as he could do under English law, it being stipulated that the plaintiff should obtain the article exclusively from C.: by the same contract C. agreed to sell to the plaintiff the first twenty cases of the article for the price agreed upon, which was to cover both the right and the goods. In September, 1877, the cases were de-

livered in England to the plaintiff, who paid the money due under the contract. Meanwhile, in August, 1877, the plaintiff had obtained registration of the design under 5 & 6 Vict. c. 100, and the copyright therein was granted to him for the term of three years. In an action to restrain the alleged infringement by the defendant of the plaintiff's copyright:

Held, on the evidence, that the plaintiff had not acquired under the contract the right to apply the design to a manufactured article, so as to entitle him to register it in his own name uu-

der the act :

 Held, also, that the plaintiff's right (if any) to protection could not have accrued till the completion of the purchase. Jewitt v. Eckhardt.
 374

See PLEADING, 55.

#### CORPORATIONS.

- The mere fact that an order has been made for winding up a company does not prevent a debenture holder or mortgagee of the company from bringing an action to realize his security. Matter of Longdendale, etc.
- 2. The P. Company granted a mortgage of all its mining property to two trustees upon trust to secure, pari pasm, the sums advanced by various lenders, of whom K. was one. Some time after wards, it being thought desirable to reconstitute the company, resolutions were passed for a voluntary windingup, and the liquidators agreed for the sale of the assets to the B. Company, which was formed for the purpose. The price was to be paid partly in bonds and partly in shares of the B. Company. A meeting of the mortgage creditors was held, at which the sale was unanimously approved of. K. was not present at this meeting, but there was evidence that he knew of and acquiesced in all that was done under the winding-up. The sale was com-pleted and the property conveyed to the B Company by a deed in which the mortgagees and their trustees did not join. Most of the mortgagees accepted debentures of the B. Company

in satisfaction of their claims; but K. did not. The liquidators made their financial report, and called a meeting to consider it, pursuant to sects. 142, 143 of the Companies Act, 1862, and the return was registered. About three years after this K. presented a petition to wind up the P. Company:

Held, by Hall, V.C., that the company could not be deemed to have been dissolved as against the petitioner and other unsatisfied creditors; and that an order for winding it up ought to be

made:

- Held, on appeal, that as the petitioner had all along known of and acquiesced in the winding-up proceedings, he could not now treat the dissolution as invalid:
- And, semble, that there is no jurisdiction to wind up a company which has been dissolved under the Companies Act, 1862, s. 143, unless the dissolution can be impeached on the ground of fraud. Matter of Pinto Silver Mining Company.
- 5. A company was established for effecting life insurances and insurances against such other kinds of risk as might thereafter be determined upon by general meeting. In March, 1872, a general meeting resolved that fire insurance and fidelity guarantees should be added to their business. New shares, called B shares, were issued to provide for this new branch of business, which was to form a separate department. The company were shortly afterwards advised that this proceeding was ultra vires and the B shares invalid; and one of the B shareholders obtained from the Court of Chancery an order removing his name from the register on that ground. An arrangement was accordingly made for starting a new company to take up the fire and fidelity guarantee business. The assets of the fire and fidelity department were to be handed over to the new company, which was to undertake the fulfilment of the contracts of that department. The new company was to issue to the B shareholders shares credited with the amounts paid by them respectively on their B shares, and the B shares were to be cancelled. The appellant, who was a B shareholder, had shares allotted to him accordingly in the new com-

pany, and, on the 24th of September, 1878, his B shares were cancelled. On the 25th of April, 1874, a resolution was passed to wind up the old company. The appellant having been placed on the list of contributories, applied to have his name removed, which was refused by Bacon, V.C.:

fused by Bacon, V.C.:

Held, by the Court of Appeal, that
the issue of B shares was not ultra
vires, and that the B shareholders
effectually became shareholders in the

company:

- 6. But held, that a corporation or company has, as an incident to its existence, the same power of compromising claims made against it as an individual has, and that the cancellation of B shares being made as part of a bona fide arrangement for compromising a dispute whether those shares had been legally issued, was valid; and that the appellant, from the time of the resolution for cancellation of his shares, ceased to be a member of the company:
- 7. But held, that, as the appellant had legally been a shareholder, the cancellation could not affect any rights previously acquired by creditors; and that he must be on the list of contributories as a past member. Bath's Case. 322, 381 note.

See Bankbuptcy, 215.
Benevolent Society, 776.
Directors, 361.
Specific Performance, 240.
Stockholders, 532.
Ultra Vires, 574.

# CORPUS.

See Income, 850, 857 note. Life Estate, 791, 792 note.

COSTS.

See AGREEMENT, 52, 54 note.

COUNSELLOR.

See AFFIDAVIT, 5, 8 note.

#### COUNTER-CLAIM.

 The defendant made the allegation that the writ had been improperly issued, and the claim for damages, in one paragraph of the statement of defence, which was numbered consecutively with the others, but was not headed separately as a counter-claim:

Held, that the pleading was good as a counter-claim. Less v. Patterson. 72

2. To an action by executors for the purpose of charging a married woman's separate estate with a debt to their testator contracted on the faith of such separate estate, the husband, who had been made a defendant, and his wife raised a counter-claim for money belonging to the wife, not part of her separate estate, and for certain chattels in the possession of the testator at his death, which it was alleged were the property of the husband:

Held, on motion under Rules of Court, 1875, Order xxxx, rule 9, that the claim to the chattels and money was a proper subject of counter-claim. Hodson v. Muchi.

#### COVENANTS.

The former owners in fee of a residential estate and adjoining lands, sold part of the adjoining lands to the defendant's predecessors in title, who entered into covenants with the vendors and their assigns restricting their right to build on and use the purchased land.

The same vendors afterwards sold the residential estate to the plaintiffs' predecessors in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers of the residential estate were to have the benefit of them; there was, moreover, in the plaintiffs' conveyance a covenant limiting their use of the purchased property, but such covenant was not coextensive with the covenants above mentioned.

In an action by the plaintiffs, to restrain the defendants, who had purchased the land first sold as above mentioned with notice of the first mentioned restrictive covenants, from building in contravention of those covenanta:

Held, that, although the plaintiffs were "assigns" of the original covenantees, they were not entitled to sue upon the original covenants. Resals v. Cowlishas. 827, 832 sots.

See Landlord and Tenant, 84, 42 note. Settlement, 711.

#### CREDITORS.

See Corporations.
Fraudulent Transfers, 312, 320 note.

#### CRIME.

See Communication, 54.

#### D.

#### DEFAULT.

 A defendant was not represented at the trial of an action, because his solicitor was ignorant of the fact that, in pursuance of an order of the Lord Chancellor, the action had, with others, been transferred from one judge of the Chancery Division to another, and had therefore only watched the list before the former judge:

the former judge:

Held, by Fry, J., that the solicitor had
been guilty of gross negligence, and
that the judgment which had been
given for the plaintiff could not be set
aside under Rules of Court, 1875, Order
XXXVI, r. 20:

 Held, on appeal, that the judgment must be set aside on payment of the costs of the day. Burgoine v. Taylor.

# DEFENCE.

See Counter-claim, 72. Pleading, 55.

#### DEFENDANTS.

See Parties, 9, 20 note.

#### DEMURRER.

- 1. An order overruling a demurrer is not an interlocutory order within Rules of Court, 1875, Order LVIII, r. 15. Trowell v. Sheuton. 812
- 2. A defendant put in a statement of defence, not demurring to any part of the statement of claim. The statement of claim was amended, not making a substantially new case. The defendant obtained leave to amend his statement of defence, and put in a statement of defence and a demurrer to part of the statement of claim:

Held, that the rule of chancery practice, that a defendant cannot demur to what he has previously answered, is no longer in force; that leave to amend the statement of defence authorized the putting in a demurrer to part of the statement of claim; and that the defendant's pleading was regular.

8. A demurrer "to such part of the amended statement of claim as claims damages alleged to have been sustained by reason of the alleged wrongful acts of the defendant in opening the accounts therein in that behalf referred to":

Held, good in form. Powell v. Jewesbury. 786

# DEPOSIT.

To abide result of suit. Scully v. Dundonald. 551

DEPOSITION.

See COMMISSION, 440.

DEVISE.

110

See Wills, 474, 477. 25 Eng. Rep.

#### DIRECTORS.

1. E. agreed with S. that S. should get up a company to purchase and work a colliery which E. had power to sell; that S. should sell to the company for a certain price in cash and shares, and that the balance, after paying prelimi-nary expenses, should be equally di-vided. S. promoted the formation of a company to purchase the colliery for £25,000 in cash and £25,000 in paid-up shares, and induced six gentlemen to become directors, engaging that they should be at no expense. The articles contained a clause empowering, but not binding, the directors to pay the preliminary expenses attending the formation of the company. Shortly before the company was registered an agreement was made between S. and the directors that S. should receive £3,500 for preliminary expenses. On this oc-casion he produced a list of prelimi-nary expenses, but did not produce vouchers, and no inquiry was made of him as to whether he was entitled to receive anything under his arrangements with E. S. received £8,200 from E., and received out of the funds of the company the £3,500, out of which he paid the calls on the shares which the directors had taken to qualify them for the office. The company having been ordered to be wound up :

Held, by Malins, V.C., that the directors were jointly and severally liable to repay to the company the sum so ordered to be paid to S. for preliminary expenses, on the ground that the money was paid in order to provide the directors qualifications.

2. Held, on appeal, that this decision must be affirmed, for that the directors had by their agreement with S. disqualified themselves for exercising a discretion as to the payment of preliminary expenses, and had not used due care and caution in examining into the propriety of paying them, and that, irrespective of the fact of their calls having been paid out of the money received by S., the payment to him was, under the circumstances, a misapplication of the funds of the company, for which they were liable under the Companies Act, 1862, a. 165. Matter of Englepted Colliery.

See Specific Performance, 240.

## DISCOVERY.

 The plaintiffs claimed to be owners in fee simple of certain land, and the defendant alleged that they were freehold tenants of a manor of which he was the lord; and that they had only customary rights over the land. The plaintiffs asked for inspection of the court rolls of the manor:

Held (reversing the decision of Bacon, V.C.), that they were not entitled to inspection. Owen v. Wynn. 782

#### DISSOLUTION.

See CORPORATIONS.

#### DIVIDENDS.

See LEGACIES, 151, 172 note. LIFE ESTATE, 344.

#### DURESS.

See PRINCIPAL AND SURETY, 432, 441 note.

# E.

#### ELECTION.

When a creditor has such a right of election he does not lose it merely because he has proved and received dividend. But he may change his election on refunding the dividend which he has received, with interest at 4 per cent., though he cannot disturb any dividend already paid. Matter of Adamson.

# EQUITY.

The duty of the tenant of land, immediately adjoining other land of his own,
 is, not merely to leave the boundary

between his own land and his landlord's distinct at the expiration of his term, but to keep it distinct during the term.

- The court has, therefore, jurisdiction during the term to ascertain the boundary if the tenant has confused it.
- A reference to chambers to ascertain boundaries directed in lieu of the issue of a commission, further consideration being adjourned and costs reserved. Spike v. Harding. 72, 77 note.

# EVICTION.

See LANDLORD AND TENANT, 99, 111 note.

#### EVIDENCE.

1. Where plaintiff, in 1876, produced the counter part of a lease granted by it in 1768, held that the counterpart produced by plaintiff was evidence against the defendant of the execution of the lease; that plaintiff was owner of the freehold of the land; and, in the absence of proof that defendant claimed under any other title, there was a presumption that his title was derived under the lease. Governors, etc., v. Knott.

See Commission, 540.

#### EXECUTORS AND ADMINIS-TRATORS.

- A mortgagor who has taken out letters
  of administration which were necessary
  to perfect the title to the mortgaged
  property, is not therefore entitled to
  be paid out of the mortgaged property
  the expenses of so doing. Saunders v.
  Dunman.
- When heir must pay mortgage, and cannot call upon personal representative to pay it. Newmarch v. Storr. 717. 724 note.

See Lunatic, 258.
TRUSTS AND TRUSTEES, 502,
506 note; 676.

F.

#### FALSE IMPRISONMENT.

See IRREGULARITY, 72,

#### FIRE.

See VENDOR AND VENDEE, 64, 71 note.

# FORECLOSURE.

 In a foreclosure action, where the estate of the mortgagor was devised in trust for sale and had become vested in an infant, who was also one of the persons beneficially interested:

Held, that the decree should centain a direction that, in case the mortgagees were not redeemed within six months, the infant should be a trustee for them within the meaning of the Trustee Act, and the executrix of the mortgagor be ordered to convey the estate to the mortgagees on his behalf. Foster v. Parker.

See Mortgage, 409.
Mortgage Foreologuee, 392.

#### FORFEITURE.

See MORTGAGE, 218, 221 note.

#### FRAUD.

See DIRECTORS, 361, 374 note.
ELECTION, 691.
PARTNERSHIP, 691, 706 note.
PRINCIPAL AND AGENT, 284.
PRINCIPAL AND SURETY, 432 note.
SPECIFIC PERFORMANCE, 240.
STAY, 9.
TRADE-MARK, 21, 55.
TRUSTS AND TRUSTEES, 502, 506 note.

# FRAUDS, STATUTE OF.

1. At a sale by auction subject to conditions, the auctioneer entered in his sale

book the names of the vendor and purchaser, the subject-matter of the sale, and the amount of the purchase-money, but omitted, in the entry, to embody or make any reference to the conditions of sale. There was no other memorandum or contract in writing:

Held, that there was no sufficient contract in writing within the Statute of Frauds, and specific performance resetused as against the purchaser. Riston v. Whatmone. 480, 482 note.

See Specific Performance, 210, 214 note. Fraudulent Transfers, 312, 320 note.

#### FRAUDULENT TRANSFERS.

1. In 1857 an infant, engaged to be married, wrote to his intended wife, promising that on coming of age he would give her seven specified houses. The marriage took place in 1859, after he came of age. In 1872 he executed a deed, not referring to any previous agreement, by which he conveyed the above and two other houses to trustees upon trust for his wife for life, for her separate use, and after her death upon trust for himself for life, and after the death of the survivor, upon such trusts as the wife should by deed or will appoint, and in default of appointment, in trust for her in fee. He subsequently agreed to sell three of the houses, and the purchaser sued for specific performance:

Held, by the Court of Appeal (reversing the decision of Hall, V.C.), that the purchaser was entitled to specific performance, for that as the settlement did not refer to any previous agreement, dealt with other property than that mentioned in the letter of 1887, and settled the property in a different way, there was no ratification in writing of the promise contained in that letter, and the settlement therefore was voluntary, and void as against a purchaser for value. Trowell v. Shenton. 312, 320 note.

See Partnership, 332, 343 note.

#### FUND.

1. Setting apart to abide event of suit, Scully v. Dundonald, 551

G.

#### GAMING.

See ILLEGAL CONTRACT, 647, 650 note.

#### GIFTS.

See TRUSTS AND TRUSTERS, 817.

# GUARDIAN AND WARD.

See MAINTENANCE, 78, 86 note.

## H.

#### HEIRS.

1. When must pay mortgage, and cannot call upon executor to pay it. Newmarch v. Storr. 717, 724 note.

#### HUSBAND AND WIFE.

See MARRIED WOMEN, 1, 4 note; 48. TRUSTS AND TRUSTEES, 228, 817.

# I.

#### INCOME.

 Testator empowered his trustees to make demises of his estate or part of it for building purposes, and also to sell all his residuary real and personal estate and to invest the proceeds. and directed them to set apart a sufficient portion of such investments to produce an annuity of £1,200, which he bequeathed to his wife for her life, payable quarterly, and he gave the entire residue of his estate after his wife's death for the benefit of his children. The income of the property was not sufficient to provide for the widow's annuity.

Held, that the widow was not entitled to have the deficiency raised out of the corpus of the trust estate. Ges v. Mahood. 850, 857 note.

See LEGACIES, 151, 172 mote. LIPE ESTATE, 844, 791, 792 mote. WILLS, 262.

## INCONVENIENCE.

1. Observations on the use of the argument ab inconvenient in the construction of wills. Hamer v. Hamer. 660

#### INCREASE.

See Income, 850, 857 note.
Legacies, 151, 172 note.
Live Reparts, 344, 791, 792 note.
Wills, 262.

## INFANTS.

See Foreclosure, 189.
Fraudulent Transfere, 212, 320 note.
Maintenance, 78, 86 note.

#### INJUNCTIONS.

- The extensive jurisdiction of granting injunctions originally given to the common law courts by the Common Law Procedure Act, 1854, ss. 79, 81, and 82, is now vested, by virtue of the Judicature Act, 1873, in the High Court of Justice. All acts, therefore, which a common law court, or a court of equity only, could formerly restrain by injunction, can now be restrained by the High Court.
- The jurisdiction of granting injunctions thus vested in the High Court is practically unlimited, and can be exercised by any judge of the High Court in any

case in which it is right or just to do so, having regard to settled legal reasons or principles. Beddow v. Beddow. 786

See Arbitration, 88, 786. Patent, 747. Trade-mark, 55. Way, 384, 392 note.

ILLEGAL BOND.

See MAINTENANCE, 78.

#### ILLEGAL CONTRACT.

 Money lent to enable the borrower to pay a bet which he has already lost does not constitute a debt for an "illegal consideration" within the act 5 & 6 Will. 4, c. 41.

Consequently, such a debt can be proved in the bankruptcy of the borrower. Matter of Pyke. 647, 650 note.

INSPECTION.

See DISCOVERY, 78%.

# INSURANCE, LIFE.

- Money payable under a policy by a life assurance society on the death of the assured is not money held upon any trust, and cannot properly be paid into court under the Trustee Relief Act.
- On an action by the assignee of a policy against an assurance society, where a difficulty had arisen as to the title to the money, the court being satisfied that the plaintiff was entitled:

Held, that the company had not discharged themselves by paying the money due on the policy into court, and that they must pay to the plaintiff the amount (which on petition would be ordered to be transferred to them),

with interest and costs. Matthew v. Northern, etc. 778

See Bona Fide, 888. Ultra Vires, 574.

INTERLOCUTORY ORDER.

See DEMURRER, 312.

INTERPLEADER.

See Insurance, Life, 778.

INTERPRETATION.

See LIFE ESTATE 791, 792 note. Wills.

INTERROGATORY.

See COMMISSION, 540.

INVESTMENTS.

See TRUSTS AND TRUSTERS, 444, 502, 506 note; 816.

## IRREGULARITY.

1. A writ of ne exect against a defendant was obtained by the plaintiff immediately after the commencement of an action. The defendant was arrested, but was discharged upon payment to the sheriff of the sum for which the writ was marked. By his statement of defence the defendant alleged that the writ had been improperly obtained, and claimed damages for his arrest, and at the trial he insisted upon this claim:

Held, that, as the defendant had not moved to discharge the writ, it must be taken to have been properly issued, and, consequently, that the defendant was not entitled to any damages. Less v. Patterson.

J.

# JURISDICTION.

- The principle under which the jurisdiction in personam of the old Court of Chancery extends, in effect, to property wherever situate, applies to the Chancery Court of the County Palatine of Lancaster.
- 2. Thus, where the defendants in an action in the Chancery Court of the County Palatine of Lancaster were within, but their property was beyond the boundary of the local jurisdiction, it was held that the jurisdiction in personam of the old Court of Chancery within the boundary, and therefore that the Palatine Court could exercise jurisdiction over the property, and could enforce any order in the action by applying to the Supreme Court under the Court of Chancery of Lancaster Act, 1854, s. 7, and Judicature Act, 1873, s. 18, subs. 2.
- Motion by the defendants to stay the action for want of jurisdiction refused with costs. Matter of Longdendale, etc. 191

- See Arbitration, 88.
Corporations, 272.
Equity, 72, 77 note.
Injunctions, 786.
Maintenance, 78.

L.

#### LACHES.

See PRINCIPAL AND AGENT, 284. MISTAKE, 807, 815 note.

# LANDLORD AND TENANT.

1. Semble, that an injury to or the destruction of demised premises, resulting

from the use of them by the tenant in a reasonable and proper manner, having regard to the class of tenement to which they belong, is not waste.

2. In a lease of a newly constructed grain warehouse there was a covenant by the lessor that he would during the term " keep the main walls and main timbers of the warehouse in good repair and condition." The lessee entered under the lease and stored grain in it, in (as the court held upon the evidence) a reasonable and proper way. After a short time a beam which supported one of the floors broke, and ultimately the external walls sank and bulged outwards, and the lessor spent a large sum in repairing the premises. In an action by the lessor to recover from the lessee what he had thus expended:

Held, that the lessee had not been guilty of waste:

- 8. Held, also, that the lessor was bound under his covenant to put the walls and main timbers in good repair, having regard to the class of buildings to which the warehouse belonged, and not merely to the condition of the particular building:
- Held, also, that the covenant implied a license by the tenant to the landlord to enter upon the premises for a reasonable time for the purpose of executing the necessary repairs.
- 5. The lease contained a proviso that, in case the warehouse, or any part thereof, should at any time during the term, "be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident," the rent, or a just proportion thereof, should cease or abate so long as the premises should continue wholly or partly untenantable or unfit for use or occupation in consequence of such destruction or damage. During the period in which the lessor was executing the repairs the lessee was excluded from the use and occupation of the whole or a part of the premises, and he claimed an abatement of rent under the proviso:

Held, that the words "inevitable accident" imported something cjuaders generis with what had been previously mentioned, and did not apply to that which, though not voidable so far as the lessee was concerned, was not in its

- nature inevitable, but resulted from the default of the lessor, and that the lessee was not entitled to an abatement of rent. Saner v. Billon, 34, 42 note.
- 6. Power of court of equity to prevent confusion of boundaries and to restore land marks, Spike v. Harding. 72,
- 7. The defendant let the basement of a store to the plaintiff "with full and undisturbed right and liberty to store cartridges therein," and covenanted to keep the premises in proper repair and condition, so as to be available for storing cartridges, and covenanted for quiet enjoyment. Other parts of the store were at that time let to other persons for storing gunpowder. Soon afterwards the Explosives Act, 1875, passed, Soon aftermaking it illegal to store cartridges and gunpowder in the same building. The defendant, upon the act coming into operation, removed the plaintiff's cartridges out of the building. A correspondence ensued, and the defendant stated to the plaintiff that the basement was at the plaintiff's disposal, but that if the plaintiff stored cartridges there the defendant must, to protect himself from liability, give notice to the authorities. The plaintiff thereupon commenced his action to restrain the defendant from obstructing the storing of his cartridges, and to compel the defendant to do everything necessary to enable the plaintiff to store them there, and for damages:

Held, by Fry. J., that the plaintiff was entitled to damages for the loss of the use of the demised premises, on the ground that the defendant's acts amounted to eviction.

8. Held, by the Court of Appeal, that judgment must be entered for the defendant, for that, 1, there had been no eviction, the removal of the plaintiff's cartridges being only a trespass; and, 2, there had been no breach of covenant by the defendant, for that the covenant to keep the premises in proper condition for storing cartridges only referred to their physical condition; and that the grant of liberty to store cartridges there did not import a warranty of the legality of so storing them, nor did anything in the lease bind the defendant to procure licenses to make the storage legal.

- 9. Semble, an amendment converting a claim on the footing of a subsisting lease into a claim on the footing of eviction ought not to be allowed. Newby v. Sharpe. 99, 111 note.
- 10. To enable a termor to work mines it must be shown that the reversioner had commenced the working of the mines with a view to making a profit; and there is no difference in this respect between a mine and a quarry.
- 11. In 1802 the owner of land demised it to a mortgagee for 500 years at a peppercorn rent. In 1811 the mortgagor granted a lease for twenty-one years to a third party of the mines and quarries under the land. Before that date a slate quarry had been opened and worked by the mortgagor on the property; and after that date, but at what time was uncertain, a second quarry was opened and was worked till the commencement of the suit. In 1820 the mortgagee foreclosed the equity of redemption in the term of 500 years, and took possession of the property. In 1873 the plaintiff, the reversioner on the term of 500 years, filed a bill to restrain the termor from working the slate quarries during the term, and for an account of profits:

Held, by Hall, V.C., and by the Court of Appeal, that if the quarries had been opened by the termor without the authority of the reversioner, the plaintiff would have been entitled to the relief prayed, notwithstanding the lapse of time:

12. But held, by the Court of Appeal (reversing the decision of the Vice-Chancellor), that the result of the evidence was that both the quarries had been opened by the authority of the reversioner, and that the termor was,

therefore, entitled to continue to work

them for the remainder of the term.

13. An intermediate assignee of the term, who had not worked the quarries himself, but had received royalties under sub-leases granted before he came into possession, and had parted with his interest before the commencement of the suit, was held, not to be liable to account either for the profits made, or for the royalties paid to him during his possession of the term. Elias v. Griffith. 446, 458 note.

14. A company entered into possession of lessehold property under an arrangement with the tenant, but without any arrangement with the landlord. The rent payable by the tenant being in arrear, the landlord put in a distress, and on the same day a petition for winding up the company was presented, on which a winding-up order was shortly afterwards made. The liquidator applied for an order under the Companies Act, 1862, a. 163, to restrain the landlord from selling the goods. The liquidator agreeing to allow the landlord to some in and prove for the rent, Malins, V.C., made an order allowing him to do so, and restraining him from selling:

so, and restraining him from selling:

Hold, on appeal, that the landlord
was not a creditor of the company; that
the court had no jurisdiction to treat
him as such; that sect. 168 does not apply where the person distraining is not
a creditor of the company; and that the
legal right of the landlord could not be
interfered with. Matter of Regent, stc.

15. In the year 1783 the Governors of Magdalen Hospital, a charitable society incorporated in 1768, granted a lease of property belonging to the hospital for ninety-nine years to a lease at a peppercorn rent. In 1876 the governors of the hospital brought an action against the defendants, who were then in possession of the land, asking for a declaration that the lease was void under the 13 Eliz. c. 10, a. 3, and to be put into possession of the property. No proof was given by the plaintiffs that the defendants claimed their title to the land under the lease:

Held (affirming the decision of Fry, J.), that the counterpart of the lease produced by the plaintiffs was evidence against the defendants of the execution of the lease, and that the plaintiffs were owners of the freehold of the land; and, in the absence of proof that the defendants claimed under any other title, there was a presumption that their title was derived under the lease.

- 16. Held, also, that the hospital, although an eleemosynary and not an ecclesiastical corporation, was within the statute 13 Eliz. c. 10, and that the lease was voidable under the 3d section:
- 17. But held, that the right of action to recover possession of the land accrued

to the governors of the hospital at the date of the execution of the lease, and that the action was now barred by the Statute of Limitations. Governors, etc., v. Knotts.

See BANKRUPTCY, 620.
MISTAKE, 807, 815 note.
WAY, 884, 892 note.

# LAPSED LEGACIES.

See WILLS, 820.

#### LEASE.

See Landlord and Tenant, 34, 42 m.; 601. Mistake, 807, 815 note. Way, 384, 392 note.

#### LEGACIES.

1. A testator being possessed, among other things, of Egyptian Nine per Cent. Bonds, and also of a leasehold house held for lives and a policy for £3.000 on one of the lives, gave several specific legacies, and, among others, specific legacies of several of his Egyptian Bonds to various legatees, and gave the leasehold house and the policy for £3,000 and all bonuses and additions thereto, to J. M., she paying the future premiums, and directed that if she should be married at his death, the house and policy should be settled on her and her children; and the testator rave the residue of his estate, including his household furniture, to A. L. After the date of his will the testator married. and by a codicil gave to his wife for her life all the income, dividends, and annual proceeds of his entire estate, and postponed the payment of all legacies and the distribution of all estates vested in him till after her death, and subject thereto confirmed his will.

Between the dates of his will and of his codicil the testator sold his Egyptian Nine per Cent. Bonds, and with the proceeds of the sale and other moneys purchased other Egyptian Bonds called

Khedive Bonds.

The holder of the £3,000 policy was entitled to a participation in the profits of the office, and had the option of taking the bonuses when declared either by reduction of the premiums or augmentation of the capital insured:

Held, that the specific legacies of the Egyptian Bonds were adeemed, and that the Khedive Bonds formed part of

the residue:

- 2. That the household furniture was not specifically given, but formed part of the residue:
- 8. That the bonuses declared by the insurance company must be added to the capital, and not taken in reduction of the premiums:
- That the premiums were not payable out of the rents of the leasehold house, but must be raised as they became payable by mortgage of the policy.

Held, also dissentiente Baggallay, L.J.), that the residuary estate must be converted according to the rule in Howe v. Earl of Dartmouth, and the income paid to the wife during her life:

- A legacy of "£500 Egyptian Nine per Cent. Bonds" held not to be specific, though the testator had such bonds at the time. Macdonald v. Irvine. 172 note.
- 6. Testator, who died in October, 1875, after giving numerous charitable and pecuniary legacies, directed that his executors should apply to any charitable or benevolent purpose they might agree upon, and at any time, the residue of his personal property which by law might be applied to charitable purposes. The executors, in January, 1876, in writing, agreed that the residue should be paid to a charitable institution to which the testator had given a legacy:

legacy:

Held, that the direction to the executors was indefinite and inoperative; that the gift failed; and that the next of kin were entitled. Leavers v. Clay-tm

7. A. was legatee in reversion after certain life interests of a testatrix's residuary personal estate. The estate consisted wholly or chiefly of a sum of £3,000 invested on mortgage of real estate by the testatrix and continued on 25 ENG. REP. 111

such investment by her trustees. A. mortgaged his interest in the £8,000, and after sixteen years (during which A. paid no interest on his mortgage) A.'s reversion fell into possession:

Held, that A.'s mortgagee was entitled as against the residuary estate to recover the whole arrears of interest, the mortgage by A. not being a charge on real estate within the meaning of sect. 42 of the Statute of Limitations (8 & 4 Will. 4, c. 27).

Semble, however, that if it had been a charge on real estate, the fact of the interest being reversionary would not have prevented the operation of sect. 42 in barring arrears of interest beyond six years. Smith v. Hill.

See Advancements, 180, 188 note. Married Women, 426. Trusts and Trusters, 676. Wills, 119, 474, 477, 686.

#### LETTER.

See AGREEMENT, 128, 131 note.

# LEVY.

See BANKRUPTOY, 510,

# LIEN.

1. A wine merchant brought an action against another wine merchant to restrain him from pirating his trade-mark by branding it on the corks of his bottles. Some of the wine in bottles with the pirated trade-mark was in the warehouse of certain whartingers who were made defendants to the action. In their defence they disclaimed all interest in the matter in dispute, and submitted to act as the court might direct upon having their charges and costs paid. At the trial they contended at the bar that the plaintiff, if his right was established, ought not to touch the bottles for the purpose of removing the

branded corks without first paying their charges:

Held (reversing the decision of Fry, J.), that the wharfingers had done nothing to disentitle them to their costs of the action; and that if the plaintiff had any lien on the wine for his costs it must be postponed to the wharfingers' lien for their charges.

2 But, quære, whether the plaintiff had any lien on the wine. Most v. Pickering. 356

See Mortgage, 409.

STAY, 551.

VENDOR AND VENDEE, 350, 354 note.

LIEN OF ATTORNEY.

See SET-OFF, 215, 217 note.

LIEN ON PARTNERSHIP PROP-ERTY.

See Partnership, 238.

#### LIFE ESTATE.

1. In 1838 property was demised for a term determinable on the dropping of three lives, reserving a yearly rent and a heriot payable on the dropping of each life, with a covenant for perpetual renewal at a specified fine on the dropping of each life. In 1869 the persons who had then become absolute owners subject to the lease settled the property in strict settlement, giving to a trustee ample powers of management, with powers to grant leases with or without covenants for renewal, and to perform any covenant for renewal previously entered into by any previous owner, or by the trustee for the time being, so that in every such appointment, lease, or demise, the best rent be reserved without taking any fine or premium. During the continuance of a tenancy for life under this settlement two lives dropped, and on each occasion a heriot was paid and the lease renewed by the trustee at a fine in pursuance of the covenant:

Held, by Bacon, V.C., that the fines and heriots ought to be treated as moneys arising under a power of sale and exchange, and to be invested in lands to be settled to the same uses.

- Held, by the Court of Appeal, that the
  powers given to the trustee did not
  affect the question, and that the fines
  and heriots were casual profits payable
  to the tenant for life. Brigstocke v.
  Brigstocke.
- 3. A testator bequeathed life annuities to various persons, and then bequeathed his general personal estate to trustees, "upon trust out of the income thereof to pay and keep down" the annuities, and, "subject thereto," upon trusts for his son and daughters:

Held, that the annuities were chargeable on the corpus. Mason v. Robinson. 381

4. A testator gave to his widow his personal estate, including his farming implements and stock, live and dead, for her life, and declared that she should not be liable to account for any diminution or depreciation in the farming implements and stock, and after her decease he gave the residue of his personal estate to his children:

Held, that the widow took an absolute interest in the farming implements and stock. Breton v. Mockett.
791, 792 note.

See Married Women, 426. Settlement, 428. Wills, 262.

LIMITATIONS, STATUTE OF.

See Landlord and Tenant, 601. LEGACIES, 843.

# LUNATIC.

 M., a pauper lunatic in an asylum at Bethnal Green, but not found lunatic by inquisition, became entitled to a small fund in court. An order was made in 1856 on petition under the Trustee Relief Act, by M. by his next friend, directing that he should continue at the asylum until further order, and, the guardians of the poor of his parish undertaking to maintain him there, that £31 a year should be raised out of the fund and paid to the guardians in repayment of the sums to be expended in his maintenance. In 1859 he was removed to the new asylum for his county by order of the justices, but without any order of the Court of Chancery. From this time no payments were applied for by the guardians. He remained in the county asylum till his death in 1875. His legal personal representative petitioned for transfer of the funds in court to him. The guardians appeared and claimed maintenance for the past time :

Held, that the guardians could not claim maintenance under the order, which ceased to be operative on the lunatics removal to a fresh asylum:

Held, also, that any claim for maintenance independently of the order was merely a debt of the lunatic, payable by his personal representative in due course of administration, and that the court had no jurisdiction in the matter to order payment of it, but that the whole fund must go to the personal representative. Matter of Marman's Trusts.

#### M.

#### MAINTENANCE.

1. In 1874, a petition was presented in the Court of the County Palatine of Lancaster for a guardian and maintenance to two infants, who were entitled for life to a very large property under their great-grandfather's will. Their mother and another person were appointed guardians, and an allowance for maintenance was fixed, and was afterwards varied from time to time by the court. In 1877, the mother, next friend of the infants, obtained in the High Court a judgment for administration of the testator's estate, and then took out a summons in the action for the appointment of guardians and an allowance for maintenance. This an allowance for maintenance.

summons was not served on the other guardian, but he heard of it, and by the direction of the Vice-Chancellor of the County Palatine took out a summons for directions in the Palatine Court. On the summons being at-tended, the Vice-Chancellor expressed strong disapprobation of the conduct of the mother in taking out the summons in the High Court, took an undertaking, which she voluntarily offered, not to proceed further with the summons in the High Court, and made a reference to the Registrar as to revising the allowances for maintenance. Soon afterwards, the mother, as next friend of the infants, applied to the Vice-Chancellor of the County Palatine to discharge the undertaking and to stay proceedings in the Palatine Court. This application having been refused, the mother, as next friend of the in-

fants, appealed:

Held, that, although the High Court had full jurisdiction to appoint guardians and order maintenance, notwithstanding the previous orders made by the Palatine Court, such jurisdiction ought not to be exercised unless some special ground was shown, inasmuch as it was better for the infants that their maintenance and education should remain under the direction of the judge who had directed them for three years, and was fully acquainted with the case: and that the proceedings in the Palatine Court ought not to be stayed:

2. But held, that, as the Vice-Chancellor of the County Palatine had no jurisdiction to grant an injunction to restrain proceedings in the High Court, he ought not to have taken an undertaking to discontinue them, and the undertaking was accordingly discharged. Matter of Alison's Trust. 78, 86 note.

# MARRIAGE.

See FRAUDULENT TRANSFERS, 312, 820 note.

MARRIAGE SETTLEMENT.

See SETTLEMENT, 711,

#### MARRIED WOMEN.

1. In an action against a married woman and her husband for a debt contracted by the wife previously to her marriage, judgment was entered against the wife for principal, interest, and costs, but in favor of the husband with costs under the provisions of the Married Women's Property Act, 1870, and the Amendment Act, 1874. The wife's property having been settled on her marriage for her separate use without power of anticipation, the plaintiffs commenced an action in the Chancery Division, for the purpose of enforcing the judgment obtained by them against the wife, and further, to be allowed to add to this the costs they had had to pay the husband:

Held, that, notwithstanding the restraint against anticipation, the plaintiffs were entitled to recover against the separate estate of the wife the amount of their judgment debt and costs, as well as the costs paid to the husband, which might be added to their original debt. London, etc., v. 1, 4 note

Bogle.

2. Since the Judicature Acts, as before, a married woman suing to recover separate estate ought to sue by a next friend, making her husband a defendant.

3. In an action of this kind the husband was made a co-plaintiff. The defendant by his statement of defence objected that the husband ought to have been a defendant. The statement of claim was afterwards amended for another purpose, but no alteration was made as to the parties.

At the trial the court ordered the husband to be made a defendant, and, in giving judgment for the wife, deprived her of the costs of the pleadings subsequent to the time when the de-

fendant took the objection. Roberts v. Evans.

4. Testatrix bequeathed to a married woman by name, describing her as married, a reversionary share of a fund of mixed real and personal estate, expectant on a life interest. The will declared that every gift thereby made to a married woman should be for her separate use, without power of antici-

pation, and that her receipts alone should be good discharges for the same. The tenant for life died in the lifetime of the testatrix, who nevertheless did not alter her will.

The married woman's share of the residue being now represented by a sum of cash standing in court, uninvested, upon petition by the married woman to have the cash paid out to her, upon her separate receipt:

Held, that she was so entitled. ter of Croughton's Trusts. 426

5. The name of a defendant, who was also the next friend of the plaintiffs, and whose wife was a defendant, was struck out, and liberty was given to the wife to defend separately. Lewis v. Nobla. 50:2

See SETTLEMENT, 428, 711.

# MINES.

See LANDLORD AND TENANT, 446, 458 note.

#### MISTAKE.

1. By a contract in 1861, A. agreed to grant an underlease to B. of certain oremises, for the residue of the term held by A., except the last ten days, such underlease to contain similar clauses and covenants to those contained in the original lease. In pursuance of this contract an underlease was prepared by the lessor's solicitor for twenty-three years less ten days, and the lease was executed by the lessee, who neither inspected the original lease nor employed any professional adviser. In 1877 it was discovered that the original lease had only sixteen years to run, and the underlease had, by mistake, been made for seven years longer than the lessor had power to grant. The lessee claimed compensation :

Held, that the lessee was to blame in not inspecting the original lease and ascertaining for himself the precise term, and that caveat emptor applied.

Besley v. Besley. 807, 815 note. Bealey v. Bealey.

# MORTGAGE.

- A mortgagor who has taken out letters of administration which were necessary to perfect the title to the mortgaged property, is not therefore entitled to be paid out of the mortgaged property the expenses of so doing. Saunders v. Dunman.
- 2. A mortgagee agreed with the mortgagor that if the interest was duly and punctually paid the principal should remain for two years. Six months' interest became due and was demanded but was not paid; and the mortgagee then demanded payment of principal and interest. Three days afterwards the mortgagor paid the six months' interest, which was received by the mortgagee:

mortgagee:

Held, that the mortgagee had not thereby, nor by a subsequent unaccepted offer to receive an instalment, waived his right to call in the principal. Keene v. Biscoe. 218, 221 note.

- The right of an equitable mortgagee by deposit of deeds without a written memorandum is a decree of foreclosure, not sale. Backhouse v. Charlton. 409, 416 note.
- 4. A charge of debts on part of testator's real estates in exoneration of the rest without specially referring to his mortgage debts, is not a sufficient expression of an intention contrary to the rule established by Locke King's Act to exonerate the mortgaged estate.
- 5. Locke King's Act applies to a mortgaged estate, different portions of which are devised to different persons; and the devisees must contribute according to the value of their respective portions.
- 6. A testator, nearly the whole of whose real estate was subject to a mortgage debt, devised a part of his real estate to his sons, "charged nevertheless in aid of his personal estate and in exoneration of his other real estate with the payment of all his just debts," and he devised another part of his real estate to his daughter:

Held (reversing the decision of Hall, V.C.), that there was no sufficient declaration of a contrary intention under Locke King's Act, and that both the devisees must contribute ratably to

payment of the mortgage debt. Newmarch v. Storr. 717, 724 note

See Bona Fide, 838.
Building Society, 824, 826 note.
Mortgage Foreclosure, 392.
Pew Rents, 150.

# MORTGAGE OF TRUST PROPERTY.

See TRUSTS AND TRUSTERS, 228.

# MORTGAGE FORECLOSURE.

1. In an action for account by a mortgagor against a mortgage in possession who has sold, the mortgagor is entitled to an account of the proceeds of sale received by the mortgages or by his order or for his use, "or which without his wilful default might have been so received;" although wilful default may not have been charged in the pleadings and proved at the trial; but such an account does not entitle the mortgagor to question the propriety of the sale or the adequacy of the amount for which the property has been sold. Mayer v. Murray.

See Foreclosure, 189. Mortgage, 409.

# MORTGAGOR AND MORTGAGEE.

See MORTGAGE, 48

N.

NAME.

See TRADE-MARK, 21, 517.

# NEGLIGENCE.

See Default, 708.
Directors, 861, 374 note.
Mortgage Foreclosure, 392.
Trusts and Trusters, 444, 502,
506 note; 816.

### NOTICE.

1. Knowledge of agent, how far constructive. Banco, etc., v. Anglo, etc. 194

See BONA FIDE, 838.

#### NOVATION.

1. A man conveyed all his property to the defendants upon trust to pay thereout a sum of £5,000 which they were to raise on his behalf, and all other debts due from the assignor, including a debt due to the plaintiff. The defendants realized the property of the assignor, and alleged that they had paid some of the debts out of the proceeds. The plaintiff brought an action against the defendants asking for an account of the property, and that the debts of the plaintiff and the other creditors might be satisfied thereout. The statement of claim contained no allegation that the assignment had been communicated to the plaintiff. The defendants demurred:

Held (reversing the decision of Ba-con, V.C.), that the defendants were not trustees for the plaintiff, and that the demurrer must be allowed. Johns v. 627, 686 note.

James.

See COVENANTS, 827.

NUISANCE.

See WAY, 384, 892 note.

P.

PARENT AND CHILD.

See MAINTENANCE, 78, 86 note.

# PARTIES.

1. As a general rule, one of several comortgagees cannot maintain an action to foreclose the mortgage, making the other co-mortgagees defendants, even though they do not oppose the foreclosure.

- 2. Semble, that such an action might be maintained if the plaintiff's co-mortgagees were colluding with the mortgagor, or if it were necessary that the court should act in haste to protect the mortgaged property.
- A person named (jointly with others) as a party to a deed, but who did not execute it, cannot alone maintain an action to have the deed declared invalid.
- 4. If it was intended that the deed should not be binding in equity unless all the joint parties should execute it, those who did execute it are capable of joining in an action to have it declared invalid, and in an action for that purpose they ought to be named as plaintiffs. Luke v. South Kennington, 20 mole,

See MARRIED WOMEN, 502. TRUSTS AND TRUSTEES, 676.

#### PARTITION.

1. In a partition suit the plaintiffs, who were entitled to three-sixteenths of the property, desired a sale by auction, alleging that by no other means could the value of this particular property be as-certained. The defendants, who were entitled to the remaining thirteen-six-teenths, objected to a sale, and offered to purchase the three-sixteenths.

Held, that the case came within the 5th section of the Partition Act, 1868, although it satisfied the conditions of the 3d section, and upon some of the defendants undertaking to purchase, a valuation was directed to be made in chambers, and sale and purchase accordingly. Gilbert v. Smith.

#### PARTNERSHIP.

1. On the dissolution of a partnership between H., C., and P., notice was given to the creditors that the business would thenceforth be carried on by P. alone, under the firm of P., Son & Co. After this the business was carried on under that firm, and a banking account was opened in that name. P.'s son constantly signed checks upon that account in the name of the firm. He also accepted bills in the name of the firm,

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negotiated loans to the firm, and sometimes ordered goods in the name of the firm. The name P. alone appeared on the outside of the business premises. The business was continued for a year and a half, and then P. and his son were, on the petition of a creditor of the business, jointly adjudicated bankrupts, as having traded as partners. did not resist the adjudication. with whom, on the dissolution of the old partnership, P. had covenanted for the payment of £6,105, part of the capital of H in that partnership, applied to the court to annul the adjudication. The Registrar refused the application, on the ground that, though no actual partnership had existed between the father and son, the son had been held out to the petitioning creditor as a partner, so as to entitle him to maintain the adjudication. This decision was not appealed from. H. then applied to the court for a declaration that the assets of the business were separate estate of the father. Both father and son deposed that no actual partnership had subsisted between them, but that it was intended from the first that the son should be a partner if the business had The petitioning turned out profitable. creditor deposed that the son had been held out to him as a partner. dence tending in the same direction was given on behalf of another creditor. Eight other creditors (the whole number who had proved being eighty-two) deposed that they had always treated the son as being a partner, and consti-tuting with the father the firm of P., Son & Co.:

Held, that the assets must be treated as joint estate of father and son.

- 2 The rule that the doctrine of reputed ownership does not apply as between a dormant and an ostensible partner, does not include a case where the real owner of property allows it to be employed in a business in which another person is a partner with himself. In such a case the property will, in the event of bankruptey, be, by virtue of the doctrine of reputed ownership, treated as joint estate of the two: Per James, L.J. Matter of Hamman.
- 3 C. and N. entered into partnership for twenty-one years as ironmongers under articles which provided that the business should be carried on for twentyone years at the G. R. premises, or "in

such other place or places as the partners may agree upon." Afterwards the partners agreed to add to their business that of ironfounders, and took for that purpose the G. Q. works. The lease of these works expired during the partnership, and C. declined to concur in a renewed lease. N. thereupon took a renewed lease of them in his own name, and insisted on his right to continue to carry on the ironfounding business there on account of the partnership:

ship:

Held, that as the partnership business could only be carried on in such place as the partners agreed upon, if they did not agree upon a place it could not be carried on at all, and that one partner, in the absence of express powers for that purpose, could not, without the consent of the other, although the partnership was to continue for a definite term, renew on account of the partnership a lease of the property on which the business had been carried on:

- Held, therefore, that C. was entitled to an injunction to restrain N. from employing the assets or pledging the credit of the partnership in carrying on business at the G. Q. works. Clements v. Norris.
- 5. B., as trustee and executor of his father's will, became entitled to one half share in a distillery business lately carried on in partnership between his fa-ther and another. In pursuance of a provision in the will, B. continued the partnership business, and afterwards purchased the interest of the beneficiaries under the will, and executed mortgages to secure the purchase-money, by one of which, dated September, 1872, B. assigned all his beneficial interest under his father's will as a security for payment of the money due, and by the same deed charged all his share and interest in the distillery partnership, and in the good-will of the business, with the repayment of the money due. New articles of partnership were then entered into between B. and the old partner, in which the former appeared as the owner of one half the business.

In June, 1877, B. was adjudicated bankrupt, and his share in the partnership had since been sold to the other partner:

Held, as between B.'s trustee in bankruptcy and the mortgagee, that the mortgage of B.'s share and interest in the partnership was a charge upon a chose in action, and as such, was not affected by the Bankruptcy Act, 1869, s. 15, or by the Bills of Sale Act, 1864:

- 6. Held, also, that to bring partnership goods within the order and disposition clause, they must have been in the sole and absolute possession of the bankrupt; and that, as the mortgagee of B's share had not acquired the right to take possession of any of the partnership property, B. was not in possession with the consent of the true owner. Matter of Bainbridge.
- 7. The plaintiffs and defendant, being partners as salt merchants and brokers, mutually covenanted by the partnership articles to diligently employ themselves in the partnership business, and "not to engage, directly or indirectly, in any business except upon the account and for the benefit of the partnership."

After the expiration of the partnership by effluxion of time, the plaintiffs discovered that during the partnership the defendant had been engaged in another business as a salt manufacturer in which he had made profits.

A bill filed by the plaintiffs to compel the defendant to account to the partnership for such profits was dismissed without costs; and an action by the plaintiffs claiming that the defendant's interest in the other business formed part of the partnership assets was dismissed with costs. Dean v. MacDowell.

332, 343 note.

- 8. Where accounts are kept at a bankers by a firm, each partner having a right to draw checks, and also by the individual partners of the firm, it is not the duty of the bankers to inquire into the propriety of any transfer of funds which may be made from and to the different accounts.
- Upon the death of one partner in a firm having an account at a bankers, the surviving partner has a right to draw checks upon the partnership account. Backhouse v. Charlton. 409,
- 10. Held, by James and Baggallay, L.J.. (Bramwell, L.J., dissenting), that where a partnership debt has been incurred by means of a fraud on the part of the partners the defrauded creditor has a

right to prove at his election against either the joint estate of the firm or the separate estates of the partners, even though no judgment has been recovered by him against the partners:

- Held, by Bramwell, L.J., that in such a case, judgment not having been recovered against the partners, there is no right to prove against the separate estates. Matter of Adamson. 691, 706 note.
- 12. By articles of partnership it was agreed that the settlement of accounts should be made half-yearly, at Lady Day and Michaelmas, and that on the death of a partner his share of the assets should be taken at the amount settled by the last half-yearly account preceding his death. By a subsequent parol agreement it was arranged that the account should be settled once a year only, vix, at Michaelmas:

Held, that this variation in the partnership articles did not affect the money interests of the partners; and that upon the death of a partner in the month of May the accounts must be settled up to the previous 25th of March. Lawes v. Lawes.

See BENEVOLENT SOCIETY, 776.

# PARTY WALLS.

1. Although a co-owner of a party wall could not at common law maintain an action against the other co-owner for temporarily undermining the foundation of the wall and replacing it with a new foundation when the work was unattended with danger to the security of the wall, yet, when within the area of the Metropolitan Building Act (18 d 19 Vict. c. 122), such a work being a right in relation to a "party structure" within the meaning of sect. 88, sub-sects. 7, 11, cannot be carried out when a difference arises between the building owner and the adjoining owner (unless they concur in the appointment of one surveyor) except by the award of two surveyors and a third selected by them, or of any two of such surveyors, as provided by sect. 85, subsect. 7, of the act. Standard, etc., v. Stokes. 765, 774 note.

#### PATENT.

- A specification is not invalid by reason
  of its describing an invention part of
  which was not new at the date of the
  patent, if, after eliminating what was
  old, a residue is left of sufficient utility,
  in which case the residue, if properly
  claimed, will be a proper subject-matter for the grant of letters patent.
- A patentee can sustain an action for an injunction to restrain a threatened infringement of his patent, even if no actual infringement has taken place.
- 8. When articles which are the subject of a patent are made without a license from the patentee simply for the purpose of bona fide experiments, those who so make them are not necessarily liable to an action, but when they are made and used for profit, or with the object of obtaining profit even to a limited extent, such making and using constitute an infringement of the patentee's rights, and will be restrained by injunction. Freezen v. Los. 747

#### PAUPERS.

See Lunatic, 258.

# PAYMENT.

 When payment of interest amounts to setting aside a legacy for the benefit of the cestus que trust, and to payment to one of the executors for his benefit. Wilson v. Rhodes.

See Payment into Court.
VENDOR AND VENDEE, 850, 854 note.

#### PAYMENT INTO COURT.

 After a decree to take the accounts of a partnership the Chief Clerk directed that two accountants, one of whom was employed by the plaintiff and the other by the defendant in investigating the accounts for the purposes of the suit, should report on the accounts, showing what items were undisputed and what 25 Eng. Rep. were disputed, and verify their report by affidavit. The accountants verified an account showing £541 due from the defendant to the plaintiff on the undisputed items, and verified also an account of disputed items. These were items of charge against the defendant, so that, however they were decided upon, the £541 would not be reduced:

Held, that the £541 ought to be ordered into court; for that, although no certificate had been made, the fact that £541 at least was due from the defendant was ascertained with sufficient certainty to entitle the plaintiff to have it ordered into court:

n ordered mes court.

- Held, also, that under the circumstances of the present case the defendant must be taken to have admitted by his agent that at least £541 would be found due from him.
- The principles on which the court acts in ordering payment into court after a decree for an account, considered. London Syndicate v. Lord.
- 4. In an administration action notice of motion was served upon a defendant, an executor, for payment into court of money, part of the testator's estate, which it was shown by affidavit that he had received. The defendant did not appear on the motion:

not appear on the motion:

Held, that, the defendant not having disputed the affidavit, there was a sufficient admission that the money was in his hands, and that he must be ordered to pay it into court.

Freeman
v. Coz.
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See AGREEMENT, 52.

PER CAPITA.

See Wills, 820.

# PERFORMANCE.

See AGREEMENT, 496, 561, 569 note. BANKRUPTCY, 252, 258 note.

PER STIRPES.

See Wills, 820.

#### PEW RENTS.

 A mortgage of pew rents made by the vicar of a district church is void under the act 13 Eliz. c. 20. Matter of Arrowsmith.

#### PLAINTIFFS.

See Parties, 9, 20 note.

#### PLEADING.

1. In an action for damages for an alleged infringement of the plaintiff's copyright in a song, the defendant, by his statement of defence, alleged that the song had not been registered at Stationers' Hall until the 9th of December, 1876, and added, "the defendant denies that the song has been duly registered. The time of the first publication thereof is not truly entered on the register."

is not truly entered on the register:"

Held, that on this pleading the defendant was only entitled to prove that the time of first publication had been untruly entered, and that he was not at liberty to prove that the name of the publisher had been untruly stated.

2. Held, also, that leave to amend the statement of defence, so as to raise the latter point, ought not to be given, even though by the plaintiff's own evidence at the trial it for the first time appeared that the name of the publisher had been untruly entered in the register. Collette v. Goode.

See Counter-claim, 72, 488. Demcrees, 736.

# POWER.

See TRUSTS AND TRUSTEES, 819.

# PRACTICE.

1. A suit having been instituted just before the Judicature Act came into operation, to ascertain the construction of legal devises, an order was made at the trial that the cause should proceed under the new practice. Homer v. Homer.

See DEFAULT, 708. DISCOVERY, 732. REFERENCE, 724.

# PRECATORY TRUSTS.

 A testator gave all his property to his wife "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so":

Held, that the wife took absolutely.

 A testamentary gift by a married man to his "family" should be read as a gift to his "children" to the exclusion of his wife. Matter of Hutchinson. 459, 462 note.

See TRUSTS AND TRUSTERS, 801, 802 note. Wills, 897.

# PRESUMPTION.

 Payment of interest to the centus que trust raises a presumption that a fund equal to a legacy is set apart as his. Wilson v. Rhodes.

See EVIDENCE, 601.

#### PRINCIPAL AND AGENT.

The plaintiff, in the year 1868, consigned a ship to G. & Co. in China for eale, fixing a minimum price of \$90,000, and requiring cash payment. G. & Co. employed the defendant in Japan to sell the ship, with the same instructions. This was done with the knowledge and consent of the plaintiff. The defendant, having vainly attempted to sell the ship on the terms mentioned, took her himself for \$90,000, and about the same time resold her to a Japanese prince for \$160,000, payable as to \$75,000 in

cash, and the rest on credit. The plaintiff was not informed that the defendant had purchased the vessel himself, or that he had resold it, till June, 1869, after the transaction was completed. The defendant paid \$90,000 to G. & Co., who remitted it to the plaintiff, and eventually obtained the whole amount of \$160,000 from the Japanese prince. In 1873 the plaintiff filed a bill in chancery to compel the defendant to account for the profit made by him in the resale of the ship:

Held (affirming the decision of Hall, V.C.), first, that the relation of agent and principal was established between the defendant and the plaintiff, and existed at the time of the purchase and resale of the ship by the defendant, and that he was therefore liable to account to the plaintiff for the profit made by

him in the transaction:

- Secondly: That there had been no such acquiescence or laches on the part of the plaintiff as to disentitle him to relief.
- 3. Where a wrongful act has been completed without the knowledge or assent of the party injured, his right of action is not ordinarily barred by mere submission to the injury, or even by a voluntary promise not to seek redress; some conduct amounting to release or accord and satisfaction must be shown; although, on account of laches, relief may be refused under special circumstances. De Bussche v. Alt. 284

See Specific Performance, 210, 214 note.

# PRINCIPAL AND SURETY.

- 1. Where parties are contracting, either of them, unless he is under a duty to the other, may keep silence even as to facts which he believes would be operative on the mind of the other; if, however, one of them has made a statement which he believes to be true, but which in the course of the negotiation he discovers to be false, he is bound to correct his erroneous statement.
- 2. In some cases, such as contracts between solicitor and client, there is a duty to make entire disclosure. In others, such as contracts of partnership, everything material must be dis-

closed. There is no such duty in the case of a contract of suretyship, but nevertheless very little said which ought not to have been said, and very little omitted which ought to have been said, will suffice to avoid the contract.

3. The officers of a company, believing that the retention of money by one of their agents amounted to felony, directed his arrest. Certain friends of his came to the officers of the company and proposed to deposit a sum of money by way of security for any deficiency. On the same day the company was advised that the acts of the agent did not amount to felony, and the directions for the arrest were withdrawn. Later in that day the friends of the agent had a second interview with the officers of the company, and agreed to deposit asum of money as security for his defaults, no mention being made of the withdrawal of the directions for the The sum of money was afterarrest. wards deposited with trustees on an agreement for the security of the com-

Held, that the change of circumstances ought to have been stated to the intending sureties, and that the agreement must be rescinded and the money returned to the sureties:

4. Held, that even if the agreement was illegal as compounding a felony, the court would interfere in a case where the money was actually in the hands of trustees, and pressure had been exercised. Davies v. London, etc. 482, 441 note.

PROCESS.

See IRREGULARITY, 72.

PROFITS.

See Landlord and Tenant, 446, 458 note.

PROMISE.

See NOVATION, 627, 636 note.

# PURCHASER.

See Vendor and Vendre, 64, 71 note; 350, 354 note.

Q.

QUESTION OF FACT.

See APPEAL, 87.

R.

RATIFICATION.

See FRAUDULENT TRANSFERS, 312, 320 note.

RECEIVER.

See Arbitration, 88.

# REFERENCE.

- When a judge has referred the amount of damages in an action to a special referee, he may accept it wholly or partially, or, if dissatisfied with it, he may wholly disregard it, or remit to the referee for amendment, but he has no power to alter or vary it.
- 2. The Master of the Rolls referred the amount of damages to a special referee, and on the report being made, being dissatisfied with the principle on which the referee had proceeded, assessed the damages himself, using for the purpose the shorthand notes of the evidence heard before the referee. The Court of Appeal reversed his decision, and remitted the case to the referee to rehear the matter, with liberty to report specially on any facts.
- 3. Whether a referee ought to state his reasons, quare. Dunkirk, etc., v. Lever.

RELIGIOUS CORPORTIONS.

See PEW RENTS, 150.

REMAINDERMEN.

See LIFE ESTATE, 791, 792 note.

REMEDIES.

See Election, 691. Partnership, 691.

RENT.

See Baneruptcy, 620.

Landlord and Tenant, 99, 111 note;
525.

RENTS AND PROFITS.

See Landlord and Tenant, 446, 458 note

RESCISSION.

See AGREEMENT, 496.

RESIDUARY BEQUEST.

See WILLS, 686.

REVOCATION.

See WILLS, 474, 477, 686.

RISK.

See VENDOR AND VENDER, 64, 71 meta.

8.

#### SALE.

1. Four months previously to his bankruptcy the debtor hired a piano from H. & Co. upon the following written terms: £15 a year for three years by equal monthly payments of 25s.; at the expiration of which term the piano became the absolute property of the hirer; but in case the instalments were not paid, or in the event of the death, bankruptcy, or insolvency of the hirer before the expiration of the term, H. & Co. were to be at liberty to determine the hiring and take possession of the instrument. There was no special mark or label on the piano to show that it was not the property of the debtor. Upon the bankruptcy, H. & Co. removed the piano from the debtor's premises. The trustee claimed the piano as being within the order and disposition of the debtor. There was evidence of a custom of letting pianos on such terms:

Held, that the custom was sufficiently established, and one which the ordinary creditors of a bankrupt must be reasonably presumed to have known, and accordingly that the agreement for hire was, on the principle of Ex parts Powell, valid, and did not come within the mischief contemplated by the Bankruptcy Act, 1869, s. 15, subs. 5. Matter of Blanshard. 510, 514 nots.

See TRUSTS AND TRUSTEES, 819.

SATISFACTION.

See AGREEMENT, 561, 569 note.

SELF CRIMINATION.

See COMMISSION, 540.

SERVICE

See APPEABANCE, 132.

## SETTLEMENT.

- A married woman has the same equity to a settlement out of property in which she has a life interest only as out of property in which she has an absolute interest, and there ought to be no distinction between the two cases as regards the amount to be settled. Taunton v. Morris.
- 2. A marriage settlement which recited an agreement to settle certain specified property upon the trusts thereinafter declared, and that it had been agreed that the husband should enter into the covenant thereinafter contained for settling upon the same trusts any future property to which the wife might become entitled after the solemnization of the marriage, contained a covenant by the husband that if at any time during the joint lives of the husband and wife any future portion, or real or personal estate, should "come to or devolve upon" the wife, or upon the husband in her right, and whether in possession, reversion, remainder, contingency, or expectancy, the husband would settle, or concur with the wife in settling. such future portion, real or personal estate, upon the trusts declared by the settlement concerning the settled funds. At the time of the marriage the wife was entitled under a will to a contingent reversionary interest in personal estate which, during the coverture, became vested, but did not come into possession until after the coverture had determined by the death of the wife:

Held, that it was not within the covenant. Matter of Michell's Trusts. 711

See CORPORATIONS.

FRAUDULENT TRANSFERS, 312, 320 note. TRUSTS AND TRUSTEES, 817.

# SET-OFF.

 In an administration suit a decree was made against a defendant, and he was ordered to pay the costs. He changed his solicitor, and subsequently thereto a motion by the plaintiffs for leave to issue an attachment for disobedience to the decree and order was refused with costs: Held, that the plaintiffs had a right to set off. Robarts v. Buèe, 215, 217 note.

See Counter-Claim, 483.

#### SHERIFF.

See BANKRUPTCY, 510.

#### SPECIFIC PERFORMANCE.

 The defendant purchased an estate, having agreed with the plaintiff that, if he made the purchase, he would cede part thereof to the plaintiff.

There was some uncertainty in the memorandum of agreement between the plaintiff and defendant as to the exact portion which was to be ceded to the plaintiff.

In an action by the plaintiff for specific performance of the agreement,

The court directed a reference to chambers to ascertain what portion the plaintiff was entitled to, and decreed that the defendant should convey such portion to the plaintiff. Chattock v. Muller. 210, 214 note.

2. An action was brought by a company for the specific performance by the defendant of an agreement which he had entered into to take 2,000 £10 shares in the company, and pay for them in such numbers and at such times as should be required for the purposes of His name had been the company. placed on the register of shareholders, and a call had been made upon him which he refused to pay. Contemporaneously with the agreement to take the shares the board of directors had agreed with the defendant to pay him £4,000 in consideration of services rendered by him to the company. This sum was to be paid twelve months after the shares should have been paid for in full. The directors afterwards called on the defendant to pay up the full amount of 1,000 of his shares, which he refused to do. The defendant alleged that the two agreements formed really only one contract for the issue of the shares at a discount; that he had not rendered any services to the company; and that the contract was divided into two parts for the express purpose of evading a provision of the company's articles of association which prohibited the directors from issuing shares at a price below par without the consent of a general meeting. No such consent had been given to the contract with the defendant:

Held, that, as the defendant had acted in collusion with the directors to defraud the company, he could not be heard to set up this fraud for the purpose of making invalid the agreement, which was ex facie valid, to take and pay for the shares:

- That as the parties had contemplated a piecemeal performance of the one agreement, the court could compel a performance of a part:
- 4. That, in the absence of any proof of mala fides, the resolution of the directors to call up the amount of the shares was conclusive evidence that the money was required for the purposes of the company.
- Specific performance of the agreement to take and pay for the shares was accordingly decreed. Odessa Tramsage v. Mendel.

# STAY.

 A partnership having, in an action brought by the plaintiff, been by order of the court dissolved, the plaintiff and defendants signed an agreement of compromise, whereby it was agreed that the plaintiff should be paid a sum of money for his share in the business.

The plaintiff subsequently repudiated the agreement, and proposed to proceed with his action, alleging that his signature had been obtained by fraud:

Held, on summons taken out by one of the defendants, and supported by the co-defendant, that the court had, under the Judicature Act, 1873, a. 24, subss. 5, 7, jurisdiction to order the stay of all further proceedings in the action:

Held, also, that as the defendants had severed upon the summons, and been represented by four counsel, the costs to be paid by the plaintiff would be for one counsel only for each defendant, Eden v. Naish. 9

8. S. commenced an action in the Common Pleas Division against D., to recover a commission claimed for services in obtaining payment of a sum from a foreign government. This sum was being administered in the Chancery Division, and S. commenced an action in that Division to establish a lien on D.'s interest, and to prevent the fund from being paid away. In this action an order was made for a sum of £5,000 to be set apart in the joint names of the solicitors of the plaintiff and defendant to answer the plaintiff's claim, and all further proceedings were stayed until after the trial of the action in the Common Pleas Division, and general liberty to apply was given. Shortly after this the solicitors of the plaintiff and defendant, by the authority of their clients, came to a definite arrangement by letter as to the amount of the plaintiff's claim. The plaintiff then applied for directions that this amount might be paid to him out of the fund set apart :

Held, by Malins, V.C., that the court had no authority to make such an order, as it would thereby be enforcing a compromise of an action in the Common Pleas Division, but held on appeal that the court had jurisdiction to make the order. Scully v. Dundonald, 551

# STIPULATION.

See STAY, 9.

# STOCKHOLDERS.

1. The proprietor of a newspaper agreed with a company to insert a series of advertisements in consideration of seventy-five fully paid-up shares in the company. Fully paid-up shares were accordingly allotted to him, but no contract was registered, as required by the Companies Act, 1867, s. 25. He sent the company a receipted bill and inserted the advertisements. The company was afterwards ordered to be wound up:

Held, that, as at the time of the allotment there was no debt payable to the allottee in cash by the company, the case was not within Spargo's Case; for that the allottee could not have sustained a plea of payment in an action by the company for calls, and that he must therefore be placed on the list of contributories as a holder of shares on which nothing had been paid. Matter of Church, etc.

- 2. A petition for winding up a company may be presented by persons who have obtained a decree of the court ordering the company to allot them shares and to register them as shareholders, although their names are not on the register at the time of the presentation of the petition. Matter of Patent Sleam, etc.

  430
- 3. A company was formed for working a mine in Cornwall, the purchase-money for which was to be paid in fully paidup shares to be allotted to the vendor or his nominees. On the 18th of January the memorandum and articles and the contract with the vendor were sent down by post from London to be registered in Cornwall. On the following day the directors met in London, in the belief that all the documents had been registered, and the vendor nominated the allottees of his paid-up shares, and the directors resolved that they should be allotted accordingly. the next day the managing director, finding that although the memorandum and articles had been registered the contract had not been registered, told the secretary not to issue certificates nor allow any dealings with the shares till it had been registered. The contract was 'registered on the 26th of January. No register of shareholders nor any books of the company were in existence till after the 26th, but before that day some of the paid-up shares had been transferred. No certificates were issued, nor was anything further done by the company with reference to the shares till after the The books were afterwards made up, treating the shares as allotted on the 19th, and registering the transfers as made on the days on which they bore date:

Held, that the shares were not to be considered as issued before the registration of the contract, and that they were to be treated as fully paid-up shares. Clarke's Case. 532

See Benevolent Society, 776. Corporations, 272. Specific Performance, 240. Ultra Vires, 574.

STORAGE.

See LIEN, 856.

SUPPORT.

See PARTY WALLS, 765, 773 note.

SURETIES.

See Condition, 9, 20 note. Principal and Surry.

SURPLUS MONEYS.

See TRUSTS AND TRUSTERS, 228,

SURVIVORS.

See Partnership, 409, 416 note. Wills, 620.

T.

TAIL.

See TENANT IN TAIL, 526.

TENANTS IN COMMON.

See Party Walls, 765, 778 note. Wills, 397.

#### TENANT IN TAIL

In the 22d section of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), which points out the person who shall be protector of the settlement, the "owner of the prior estate" is the person who is entitled under the settlement to the beneficial enjoyment of the reats and profits.

In a will made before the passing of the act the testator, being entitled to the equity of redemption of a freehold estate, devised the same to trustees and their heirs to the use of them and their heirs during the life of A. (a married woman), in trust for A. for her separate use, with remainder to the use of B. in tail, with remainders over. In 1871, the legal estate being still outstanding, the first tenant in tail, with the consent of A. as protector, disentailed the estate:

Held (affirming the decision of Jessel, M.R.), that the entail was effectually barred, A., and not the trustees, being the proper protector of the settlement.

Matter of Dudson's Contracts.

526

TENDER.

See AGREEMENT, 52.

#### TITLE

1. The plaintiffs, bankers at Lima, established a credit agency with the General Company in London, and agreed to send remittances within ninety days to cover drafts. The General Company, being in difficulties, obtained an advance of money from the Peruvian Bank, to be repaid out of expected remittances from the Lima Bank to cover bills then current, and the Peruvian Bank employed as agents to receive and select from the expected securities, the managing director of the General Com-pany and their own managing director, who had been, two years previously, the manager of the General Company, and was cognizant of and party to the arrangement with the Lima Bank. The securities were selected by and handed over to the Peruvian Bank upon their

arrival, and the following day the General Company stopped payment and was wound up:

Held, that the Lima Bank had no title to recover the securities from the Peruvian Bank. Banco, etc., v. Anglo, etc.

See Sale, 510, 514 note.
Tenant in Tail, 526.
Vendor and Vender, 64, 71 note.

#### TRADE-MARK.

1. The plaintiff manufactured a fluid which he sold under the name of "Aromatic Bitters," and it was described by this name upon the wrappers of the bottles in which it was sold. It became, however, generally known in the market by the name of "Angostura Bitters," it having been originally manufactured at the town of Angostura in Venezuela. The name of this town was afterwards, by a decree of the state, changed to Cuidad Bolivar. After this change had taken place, the defendant began to manufacture in the same town a different fluid, which he at first sold under the name of "Aromatic Bitters," but. having been restrained in an English colony from using that name, he adopted the name "Angostura Bitters," placed it upon the wrappers of his bottles, also registering his wrapper at Stationers' Hall. His wrappers were very similar to those of the plaintiff, but they contained a statement that the fluid was prepared by the defendant. After this the plaintiff adopted the name " Angostura Bitters," and placed it upon his wrappers, and he brought an action against the defendant, claiming an injunction to restrain him from imitating the plaintiff's wrappers, and from using the name "Angostura Bitters." At the time when the action was brought the plaintiff had ceased to carry on his manufacture at Cuidad Bolivar:

Held, upon the evidence, that the defendant had been guilty of an attempt to deceive, and that, though he could not be restrained from using the name "Angostura Bitters," in case he should ever discover the plaintiff's secret, and manufacture the same fluid, yet he must be restrained from using the name so as to deceive the public into the belief that his fluid was the plaintiff's.

25 Eng. Rep. 113

2. It was alleged by the defendant that the plaintiff was disentitled to relief, because, at the time of the trial, he was using wrappers which contained a misrepresentation. The plaintiff did not begin to use those wrappers until after the action had been brought:

Held, that there was in fact no misrepresentation in the wrappers in question, but that, even if there had been, a misrepresentation not made till after the commencement of the action would not have affected the plaintiff's title to relief. Siegert v. Findlater. 21

- 3. Where the inventor of a new substance has given to it a name, and, having taken out a patent for his invention, has, during the continuance of the patent, alone made and sold the substance by that name, he is nevertheless not entitled to the exclusive use of that name after the expiration of the patent. Linoleum, etc., v. Naira.
- 4. The plaintiff was the owner of and worked all the collieries in the parish of R. in Somersetshire, and owned all the coal in that parish, with a small exception. She carried on the business of working the collieries and selling the coal in her own name, adding to it on her wagons and bill-heads the words "R. Collieries." The defendants, from 1868, carried on at R. the business of coal merchants as the "R. Coal Co.," having depote at various railway stations in the south and west of England, at which they sold different kinds of coal. They became in 1876 the lessees of and worked a colliery outside the parish of R., but in a district or basin in which coal was raised similar to that raised within the parish, coal raised in the district, but outside the parish, being known in the market as R. coal. In 1873 the defendants began to sell coals at G. in Surrey, by means of a local agent, and in 1875 they bought the good-will of a retail coal dealer named C. at G., who had become bankrupt. They then advertised themselves in the Surrey newspapers, and otherwise in the neighborhood, as "The R. Colliery Proprietors and Factors, Coal and Coke Merchants (late C. & Co.)," and offered to supply coal of every description direct from the collieries:

Held, that the defendants were not entitled to use the name "The R. Colliery Proprietors," unless and until they should acquire a colliery within the parish of R., or to use any style implying that their coal came from the parish of R., unless and until they should become authorized to sell coals raised from a colliery within that parish:

- 5. Held, also, that, the acts of the defendants being calculated to induce purchasers to believe that the defendants were selling the plaintiffs coal, it was not necessary for the plaintiff to prove any instance of actual deception, or any actual damage. Braham v. Beachim. 55
- 6. The plaintiffs were the publishers of a work intituled "Hemy's Royal Modern Tutor for the Pianoforte," a revised edition of which had been brought out in 1867, and which was well known and had an extensive sale, but was not so registered as to secure copyright. In 1874 the defendant employed Hemy to revise an old work, intituled "Jousse's Royal Standard Pianoforte Tutor, which had formerly been in high repute, but had entirely fallen into dis-use. This revised work the defendant brought out under the title, "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor," the word "Hemy's," both on the outside of the book and on the title-page, being printed in much larger and more conspicuous type than any other of the words:

Held, by Malins, V.C., and by the Court of Appeal, that the plaintiffs were entitled to an injunction restraining the defendant from offering his work for sale with its present form, title-page, and cover, or any other form, title-page, or cover, calculated to deceive persons into the belief that it was the plaintiffs' work. Metzler v. Wood. 517

7. When a label for cotton goods, which had been used as a trade mark before the passing of the Trade Marks Registration Act, 1875, has been placed by the Committee of Experts, appointed under the 59th Rule of the Rules for Registration of Trade-Marks, in the second class, as not being a trade-mark as defined by the act, the decision of the committee is, in general, final; and a judge of the Chancery Division ought not to order the registration of such label except under special circumstances; as, for instance, that the com-

mittee have proceeded on a wrong principle. Matter of Orr Ewing's Trademark, 690

See LIEN, 356.

#### TRUSTS AND TRUSTEES.

1. By a marriage settlement land of the husband was conveyed, "for making a provision" for the wife and the issue of the intended marriage, to such uses as the husband and wife should during their joint lives by deed appoint, remainder to the use of the husband for life, remainder to the use of the wife for life, remainder to the use of the children of the marriage as the husband and wife should by deed jointly appoint, or as the survivor should by deed or will appoint, and, in default of appointment, to the use of the chil-dren in equal shares as tenants in common in fee, and, if but one child, to the use of that one child in fee, with an ultimate remainder in default of children to the use of the heirs and assigns of the husband. There was a proviso that the grantees to uses and the survivor of them, and the executors and administrators of the survivor, their or his assigns, should, after the death of the survivor of the husband and wife, and during the respective minorities of any of their children, receive the renta of the share of such child or children, and should, after providing for his, her, or their maintenance and education, invest the surplus (if any) as therein mentioned, and accumulate the same in trust for the persons who should ultimately become absolutely entitled to the shares from which the same should have proceeded. No money fund (other than these accumulations) was included in the settlement, and it contained no power of sale. Some years after the solemnization of the marriage the husband and wife mortgaged the property. The mortgage deed con tained a recital of the settlement, and a recital that the husband and wife had requested the mortgagee to lend them £600 on the security of the property, which he had agreed to do, but it contained no other recital, and by it the husband and wife, in exercise of their joint power, appointed the property to the use of the mortgagee in fee, but

subject to a proviso for redemption on payment of the mortgage money. The proviso was for reconveyance of the property to the uses of the settlement. The mortgage contained a power for the mortgagee to sell the property, and a declaration that, in case the property or any part of it should be sold under the power, the mortgagee should, after paying the expenses of sale and the principal and interest due upon the mortgage, pay over the surplus (if any) to the husband, his heirs, Adon the administrators, or assigns. After the death of the husband the mortgagee sold the whole of the property, and, after payment of expenses and the mortgage debt and interest, there remained a surplus in his hands:

Held, that there was no resulting trust of the surplus, but that the husband's personal representative was en-titled to it as part of his personal estate. Jones v. Davies.

2. In an action for sale and partition, the plaintiffs were trustees for sale of twothirds of certain leasehold property, and the defendants were trustees for sale of the remaining third part after the death of a tenant for life. The

cestuis que trust not being parties:

Held, that the trustees for sale sufficiently represented their cestuis que trust, and a sale and partition were directed without notice to the parties benoficially interested. Stace v. Gage. 421

3. A mortgagee of a share of the proceeds of a real estate devised in trust to sell and to invest the proceeds in govern-ment or real securities, commenced an action against the mortgagor and the trustee of the will, alleging that the money had been invested upon improper securities. An order was made directing accounts and inquiries, and reserving further consideration. Shortly afterwards the trustee paid into court the amount of the mortgaged share, and paid to the other benefi-ciaries their shares. The certificate found these payments, and as to the mode of investment stated simply that the money had been invested on mortgage of leaseholds. On further consideration the plaintiff did not give notice to read the evidence used in chambers. Hall, V.C., declined to hear the evidence taken in chambers, held that on the finding in the certificate

the investment was not shown to be improper, and that the action was unnecessary, and made an order giving the trustee his costs, and costs, charges, and expenses out of the fund in court: Held, by the Court of Appeal,

1. That as the order gave the trustee costs, charges, and expenses, not being costs of suit, it was not simply an order as to costs within the discretion of the court, and was subject to

appeal:

- 2. That the case was one where leave to adduce further evidence on the appeal ought to be given, so as to bring before the court full information as to the nature of the investments:
- 8, That under a trust to invest in real securities an investment on mortgage of leaseholds is improper, unless the leaseholds are for a long term of years at a peppercorn rent without onerous covenants:
- 4. That the order of the Vice-Chancellor as to costs being made on the ground, which was established, that the fund never had been, nor had been believed by the plaintiff to be, in danger, and that the action was therefore unnecessary and improper, ought not to be interfered with; and that as the other beneficiaries had had no benefit from the action, the costs were properly payable out of the plaintiff's share. Jones v. Chennell. 444
- A testator by will gave all his residue to trustees upon trust to invest in the parliamentary stocks or funds, or upon real securities; and the will contained a proviso that as often as the trustees should think it expedient so to do, they might sell out, transfer, or otherwise vary any of the trust moneys, funds, and securities, and invest the same in or on any other funds or securities whatsoever:

Held, that the sale of New £3 per Cent. Annuities and the investment of the proceeds in Russian railway and Egyptian bonds was authorized, and not a breach of trust.

5. Each of two trustees retained possession of a moiety of bonds held in trust. and which passed by delivery, and one trustee committed a breach of trust;

Held, that the other trustee was liable to make good the loss sustained. Lewis v. Nobbs. 502, 506 note, 6. A testator bequeathed the residue of his personal estate to three trustees, R., L., and I. (who were also his executors), upon trust to invest the same. and to pay the income to his widow for her life, and after her death "to lay out and invest or retain invested \*£850, and to pay the income of £500, part thereof, to his daughter M. for her life, with remainder to her children, and upon trust to pay the income of the remaining £350 to his daughter B. for her life, with remainder to her children. And, in the event of the death of his daughter M. without issue, her share was to be divided among L., I., and B. The testator died in December, 1854, and his widow died in June, 1856. The daughter M. died in January, 1859, without issue. After the death of the widow, R. began to pay interest to B. on £350, and after the death of M. on £516 13s. 4d. (i.e., on the £350 and one-third of the £500). and continued the payment half-yearly until his death, which took place in September, 1863. Part of the estate of the original testator consisted of a sum of £1,200 lent upon mortgage. Before the death of R. £700, part of this sum, had been paid off by the mortgagor in instalments. For some of these instalments R. alone gave receipts, and he joined in the receipts for others. After R.'s death, J., one of his executors, continued to pay interest to B. on £516 13s. 4d. until June, 1874, when the payment ceased. He made these payments with the knowledge of his co-executors and of the persons beneficially interested in R.'s estate, and the payments were admitted as proper deductions upon a half-yearly settlement of the accounts of the income of R.'s estate made between the executors and the beneficiaries. £500 remaining due on the mortgage was paid off by instalments after the death of R., the receipts for the instalments being signed by his executor J., as "for the executors" or "for the trustees" of the original testator. J. paid one-third of the £500 to L., and another third to I., and retained the remaining one-third. In 1877 B. commenced an action against the executors of R. alone, claiming to have the sum of £516 13s. 4d. and the arrears of income made good out of the estate of R.:

Held, by Fry, J., that, as R.'s executors could not properly have paid interest to B. after his death, unless the

executors of the original testator had assented to the legacy and had set apart in the hands of R. a fund to meet it, it must be assumed that such an appropriation had been in fact made:

- And, therefore, that B. was entitled to sue the executors of R. alone, without making the other trustees of the original testator parties.
- And the executors of R., admitting assets, were ordered to make good the £516 13s. 4d., with the arrears of income, out of his estate.
- On appeal the defendants waived the objection as to want of parties, and the judgment of Fry, J., was affirmed. Wilson v. Rhodes.
- 10. A testator gave his wife the whole of his real and personal property for her sole use and benefit, and continued, "It is my wish that whatever property my wife might possess at her death be equally divided between my children":

Held, that this was not a gift coupled with a trust, and that the widow took an absolute interest in the property. Parnall v. Parnall. 801, 802 note.

- 11. Trustees of settlements coming within the operation of Lord St. Leonards' Act, 1860 (23 & 24 Vict. c. 38), may invest the trust funds in any securities in which cash under the control of the court may be invested, notwithstanding prohibitive or restrictive words in the instrument creating the trust. Matter of Wedderburn's Trusts. 816
- 12. A husband by deed-poll recited as follows: "Whereas I am beneficially possessed of the ground rents hereby intended to be settled," and continued as follows: "I do hereby settle, assign, transfer, and set over unto my wife as though she were a single woman," several leasehold houses and the ground rents thereof.

The deed was voluntary:

Held, that this deed was not void as being an intended assignment from husband to wife, but operated as a declaration of trust. Baddeley v. Baddeley. 817

 A sale out of court may be directed under the Settled Estates Act, 1877, the purchase-money being brought

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into court; and such a sale may be authorized to be made by public auction or private contract, subject to a reserved price to be fixed by the judge in chambers. Matter of Adams's Es-

See Charity, 465, 485. INSURANCE, LIFE, 778. MORTGAGE FORECLOSURE, 392. NOVATION, 627, 636 note. PRECATORY TRUSTS, 459, 462 note. SPECIFIC PERFORMANCE, 210, 214 note. WILLS, 397.

# U.

# ULTRA VIRES.

- The B. N. Company was an insurance company established with £10 shares, under a deed of settlement which provided that every instrument whereby the company became liable to pay money should contain a clause limiting the liability of shareholders to the amount payable on their shares. The deed contained a power to the company, with the sanction of an extraordinary general meeting, to purchase the business of any other company of a similar nature, upon such terms as the meeting should think fit. The company resolved to purchase the business of the B. C. Company, an insurance company whose capital was divided into £50 shares, on each of which £5 had been paid, and whose deed of settlement contained no power to sell the business. The transaction was com-pleted by purchasing the shares of the B. C. Company, which were transferred to various officers of the B. N. Company. Subsequently a deed was executed by which these transferees transferred their shares to the B. N. Company, and thereupon that company was entered on the register of shareholders of the B. C. Company, and remained so registered for some years. This deed was never sanctioned by a general meeting of the B. N. shareholders. An order having been made for winding up the B. C. Company:
  - . Held, that the transfer of the shares to the B. N. Company was ultra vires and invalid, and that the B. N. Com-

pany could not be placed on the list of contributories of the B. C. Company.

By the European Arbitration Act, 1875, it was enacted that as regards any determination or order given or made before the passing of the act, no appeal should lie therefrom unless the arbitrator expressly certified in writing that by reason of differences between previous decisions on matters of principle it was desirable that an appeal should be brought:

Held, that a formal certificate from the arbitrator, and not a mere expression of opinion, was necessary to give the Court of Appeal jurisdiction; and that differences between previous decisions referred to decisions before the passing of the act. Matter of European Society Arbitration.

See Corporations, 322, 331 note.

#### V.

#### VENDOR AND VENDEE.

Under the terms of a lease the land lord covenanted to insure, and the tenant had the option to purchase for a fixed sum. Before the time for exercising the option, the buildings demised were burnt, and the landlord received the insurance money. tenant then exercised his option to purchase and claimed the insurance money as part of his purchase :

Held, that, under the circumstances, the tenant had no claim to the insurance money. Edwards v. West. 71 note.

2. A bankrupt had, before adjudication, the purchaser having had no notice of any act of bankruptey, contracted to sell some leasehold property, and had received a deposit in respect of the purchase money. After the adjudication had been made, but before it had been advertised, the purchaser, having no notice of the adjudication, paid the remainder of the purchase-money to the bankrupt:

Held (reversing the decision of the Registrar), that the trustee in the bankruptcy could not be compelled to assign the lease to the purchaser except upon the terms of his paying the pur-

chase-money.

- 8. Whether, if the lease had been assigned before the adjudication, but a part of the purchase-money had not been paid, and the purchaser had, after the adjudication, paid it to the bankrupt, without notice of the adjudication, he could have been compelled to pay it over again to the trustee, quare.
- Observations per James, L.J., on the practice of delaying advertisements of adjudications. Matter of Rabbidge. 350, 354 note.

See SALE, 510, 524 note.

### W.

## WAGERS.

See Illegal Contract, 647, 650 note.

#### WAIVER.

See Accord and Satisfaction, 284. Principal and Agent, 284.

#### WAY.

1. Defendant, the owner of a house with a gateway and a paved road under it leading to a paved yard, and a vacant piece of ground at the rear, agreed to grant to the plaintiff a lease of the house and vacant ground and the ap-purtenances, with power to erect on the vacant ground a workshop for the purposes of his business as a gas engineer, and it was stipulated that the plaintiff should not obstruct the gateway, except for the purposes of ingress and egress. The workshop was erected, and the only access to it by vehicles was through the gateway and over the yard which were also the only approach to the stables of the defendant, who carried on business in adjoining premises. The defendant's vans, before the agreement was entered into, had often stood in the yard when not in use. The plaintiff now alleged that the defendant blocked up the gateway and yard with his vans, and prevented the access of carts and vehicles to his workshop:

Held, that, under the agreement, the plaintiff had an implied right of way through the gateway and over the yard for the reasonable purposes of his business; that such right was general and not restricted; and that he was entitled to an injunction to restrain the defendant's obstruction. Cannon v. Villars.

384, 392 note.

#### WHARFINGER.

See LIEN, 356.

#### WILLS.

1. A testator gave his residuary estate to his wife for life, and after her decease to such of the children of his two late sisters as should survive his said wife and should attain twenty-one or marry, in equal shares; but in case any of such children should be dead at his (the testator's) decease, then he directed that such issue should take the share of their deceased parent:

Held (affirming the decision of Bacon, V.C.), that the gift to the issue of deceased children was a substitutionary gift, and that the issue of a child who was dead at the date of the will could take nothing. West v. Orr. 119

2. A testator who died in 1852, gave freehold and leasehold estates to trustees upon trust for his wife for life or second marriage, and in case she should marry again, then from and after that event, during the remainder of her life, in trust to receive the rents and to hold the same during her life upon the trusts thereinafter mentioned, and after her death to the use of G. absolutely. He then gave his personal estate to the same trustees, and directed them to pay the income to his wife during her widowhood, but if she should marry again, then from and after such marriage all these bequests in her favor were to cease, and in lieu thereof they were to pay her, out of the rents and income, an annuity of £500, and, during her life, to invest the surplus (if any); and after her decease such trust moneys, surplus, rents, funds, and ac-

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posed of by the trustees in paying certain legacies; and the residue he gave to T. M. absolutely. The widow married again in 1854. Her annuity had been paid, as well as the debts and legacies, and since her marriage the residue of the rents and income had been invested and accumulated:

Held (affirming the decision of Hall, V.C.), that as to the surplus rents and income which would accrue between the expiration of twenty-one years from the testator's death and the death of his widow, there was an intestacy; and that T. M. was not entitled during the life of the widow to ask for payment of the accumulated funds, subject to provision being made for payment of the annuity and legacies. Weatherof the annuity and legacies. all v. Thornburgh.

8. A testatrix devised real estate to two persons, their heirs and assigns, as tenants in common, for their personal use and benefit, without any restriction, trust, or condition whatever. One of, the devisees was a mere acquaintance of the testatrix, and the other was her solicitor, who prepared her will and to whom she expressed her intention of leaving her property to charitable purposes. The solicitor informed her that such a devise would not be legal, and this absolute gift was then executed. No undertaking, express or implied, was given by the devisees to accept a charitable trust, though the testatrix probably expected that the devisees would apply the property to some good and useful, but not necessarily charitable, purpose:

Held, that whatever might have been the wish or expectation of the testatrix. the devisees were not bound by any secret trust to carry out such intention, but were free to dispose of the property as they pleased; and an action claiming to have the devise de-

clared void was dismissed.

4. One of the devisees had no intimation during the life of the testatrix that she had devised property to him:

Held, that the gift to him, as one of two tenants in common, would not have been void even if a secret charitable trust had been proved with regard to the other devisee, though it would have been so in the case of joint tenants. Rowbotham v. Dunnett.

cumulations of income were to be dis- | 5. A testator devised freeholds in Dorsetshire upon certain trusts, and bequeathed £3,000 to his trustees to purchase lands in Dorsetshire to be held upon the same trusts. By a codicil he revoked the devise of his free holds, and declared other trusts without alluding to the £3,000:

Held, that there was no implied revo cation of the bequest of £3,000, which would pass under the will as if no codicil had been made. Bridges v. Strachan.

6. A testator gave two legacies, and then gave his sheep and all the rest, residue, moneys, chattels, and all other his effects, to be equally divided among his four brothers, whom he appointed his executors:

Held, that all the freehold as well as personal estate of the testator passed under these words. Smyth v. Smyth. 477

7. A testator devised certain freehold property to trustees, their executors and assigns, in trust as to three freehold houses for the sole benefit of his two daughters E. and S., either to live in or let for their joint benefit, and should either of his daughters die and leave no children or child, then either one of the houses, at the option of the survivor, to be sold, and the produce di-vided between the survivor and such of the testator's sons as should be living; but if either of his daughters should marry and have a child or children, then such child or children to have the mother's share of the rents and profits of the three houses after the mother's decease. On the death of one daughter without children one of the houses was sold, according to the direction in the will. The other daughter then died without children:

Held, that the gift for the sole benefit of the two daughters of the testator gave them an estate commensurate with the estate in fee given to the trustees, and made them joint tenants in fee subject to executory gifts over in the event of their dying leaving issue; and that, this event not having happened, the joint tenancy in fee was unaffected, and the devisee of the survivor was entitled to the two unsold houses. Yarrow v. Knightly.

8. A testator devised all his lands "situated at or within D., in the occupa-tion of J." The testator was seised of two farms, both in the occupation of J. The greater part of each of the farms was within the parish of D., but three closes of one and one close of the other were respectively situate in an adjoining parish. In each case the portion which was not in the parish of D. immediately adjoined the remainder of the farm, and was only separated from it by the parish boundary, which was, in the one case, a high road, and in the other, a fence. In the latter case the parish church of D. was only a few yards distant from the fence:

Held, reversing the decision of Fry, J., that the devise comprised the four closes adjoining the parish of D.

 The testator also devised all his land "situate at G., in the occupation of S.":

Held (affirming the decision of Fry, J.), that this devise did not include land situate at G., but in the occupation of J.

- Observations on the use of the argument ab inconvenienti in the construction of wills Homer v. Homer.
- 11. A testator by his will directed his trustees and executors to pay his debts and funeral and testamentary expenses out of his personal estate, and if that should be insufficient, he charged them on his real estate; and he bequeathed all the rest and residue of his personal estate to his daughters. By a codicil, after making alterations in the dispositions of his real estate, he proceeded: "As to all moneys that may be left after my decease, I give and bequeath the same" upon the trusts therein mentioned:

Held, by Hall, V.C., that the gift in the codicil was a residuary bequest of the personal estate revoking the residuary gift in the will.

- 12. Held, on appeal, that the gift in the codicil was only a gift of the money which was in the testator's hands at his death; and that, subject to this exception, the residuary gift in the will remained in force. Williams v. Williams.
- 13. R., being seised of freehold houses, died intestate in 1864, leaving A. his

sole heiress-at-law. Upon R.'s death, his widow wrongfully entered into possession, and retained possession till her death in 1869, when her devisees entered. A. died in 1871, without ever having entered into possession of the property, having devised to L. all real estate (if any) of which she might dis seised.

An action having been brought by L. against the devisees of R.'s widow for recovery of the land:

Held, on demurrer (affirming the decision of Jessel, M.R.), that "seised," being a purely technical word, and there being no qualifying context, it must be construed according to its technical meaning; and that as A. at the time of her death had no seisin at law or in fact, the property did not pass under her devise. Leach v. Jay. 744

14. A testatrix bequeathed the residue of her property to be equally divided be tween the five daughters of Samuel and Mary L. for their own use:

Held, that this was a bequest to the five daughters as persona designate and not as a class. Matter of Smith's Trusts.

15. A testator by his will gave a fund to trustees "in trust for the lawful issue of F. H. surviving him equally to be divided between them if more than one . . . and if but one then for such only child," with a gift over "in default of issue of F. H. becoming entitled."

The issue of F. H. who survived him were a son, a daughter, four children of the son, and aix children of a deceased daughter:

Held, that by the use of the word "child" the testator had himself interpreted the word "issue," and that the word "issue" must be restricted to children, and the fund go in moieties between the surviving son and daughter.

Matter of Hopkins' Trusts.

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u .	u	same person cannot act for both parties, XXV, 432.
"	"	memorandum must be complete, XXV, 432.
u	"	A. delivers property to B., in consideration whereof B.
		promises to pay C., XXV, 636, 637, 639-40.
Fraudule	ent Transfe	ers, when gift by husband to wife valid as against creditors,
		XXV, 320.
4	"	wife thrown on own resources may trade, XXV, 320.
u	*	husband managed wife's farm, XXV, 320.
4	44	if wife allows husband to use property as his own, bur-
		then on her of showing title, XXV, 320.
66	æ	to extent husband's contribution, creditor may reach.
		XXV. 321.
"	Œ	husband's labor adds to value, XXV, 321.
•	*	husband trades in wife's name to defraud creditors,
		XXV. 321.
4	CC CC	wife allowed husband to use her property as his, and thus
		obtain credit, XXV, 821.
"	u	presumption was gift to husband, XXV, 321.
u	æ	agreement by husband to pay wife for releasing dower.
		XXV, 321.
4	u	husband gave her note for much more than value of her
		dower, XXV, 321.
u	u	held not to be so given, but claim was an after-thought,
		XXV. 821.
4	"	husband gave wife all his property to marry him, fraud-
		ulent as to creditors, XXV, 321.
•	cc.	so, if for taking care of him, XXV, 321.
4	u	wife joined in deed and note for purchase money given
		to her, held fraudulent as to creditors, XXV, 322.
u	u	when settlement by corporation with stockholders valid
		as against creditors, XXV, 381.
44	u	son covenanted to support father; father released; over-
		seer of poor cannot avoid release as fraudulent, XXV.
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# G.

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# H.

Heir, against co-heir, value of property at time descent cast, irrespective of subsequent improvements, XXV, 458.

" nor can he recover for repairs, XXV, 458.

" when must pay mortgage, XXV, 644.

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<sup>&</sup>quot;Heirs," when words of limitation and not of purchase, XXV, 794.

Husband and Wife, liability of husband for wife's debt before marriage, XXV, 4.

" form of judgment and execution under statutes, XXV, 4. husband purchased real estate and took deed in name of wife, assuming mortgage, XXV, 648.

" wife may assume mortgage, XXV, 648. husband liable on his oral promise to assume, XXV, 648. See Fraudulent Transfers.

# I.

Illeg	al Agreemen	ta, loaning money to pay gambling debt, XXV, 650.
**	16	prohibited where made, not enforced elsewhere, XXV, 650.
u	u	no country bound to enforce contract injurious to own interests, XXV, 651.
66	a	made in one country to be performed in another, parties bound to know law of place of performance, XXV, 651.
66	u	if invalid there, not enforced, XXV, 651.
u	u	if advertising lotteries forbidden, doing so illegal, though
u	u	lottery legal where located, XXV, 651.
ű	"	so contract to sell tickets of foreign lottery, XXV, 651.
		mere sale, knowing vendee intended violating law of another state, may recover, XXV, 651.
u	u	otherwise if seller do any act, such as packing, etc., calculated to assist violation, XXV, 651-2.
Œ	u	sale subject to approval at buyer's residence, governed by laws there, XXV, 652.
u	u	to make illegal must be manifestly and directly so, XXV, 652.
u	"	not sufficient connected with some remote violation of law,
u	u	XXV, 652. contract not stamped according to law of place where
"	"	made, XXV, 652.
	4	if contravenes policy of law, void, XXV, 652.
4	u u	but must first have life as completed contract, XXV, 652.
u		court will not aid one founding action on illegal contract, XXV, 652.
	u	if party does not object, duty of court to, XXV, 652.
"	"	duty of court to turn such suitor away, XXV, 652.
u	u 	not grounded on regard for defendant, XXV, 652.
u	64	law will not support claim founded on its own violation, XXV, 652.
æ	u	whenever illegality appears, no matter from which side, disclosure fatal, XXV, 652.
"	66	though defendant have not pleaded illegality, XXV, 652.
u	u	difference in rule as to which party shows, XXV, 652.
u	"	no recovery for value parted with on illegal contract, XXV, 652.
ш	u	if based on illicit intercourse, position of possessor vest, XXV, 652.
u	u	no difference whether mala prohibita, or mala in se, XXV, 653.
66	<b>u</b>	test of illegality, XXV, 658.
u	u	if connected with illegality, though new contract, XXV,
66	u	658.
"	4	not, if auxiliary or promotive of illegal act, XXV, 653.
"	u	agreement to pay commission for selling office, XXV, 653. affects all contracts, though antecedent, made in aid of,
"	u	or to effectuate illegal purpose, XXV, 654. if act forbidden, all contracts growing out of its perform-
	25 Eng. R	ance void, XXV, 654. EP. 115

<b>.</b>		
megal	Agreements-	
		no contract contrary to principles of morality valid, XXV, 654.
66	"	not heard, if seeks to enforce contract founded in or arising out of moral, or political turpitude, XXV, 654.
"	"	nor if springs out of illegal contract, XXV, 654.
Œ	"	as to use influence to obtain public contract, XXV, 654.
66	"	if connected with illegal or immoral act, XXV, 654.
46	46	so if in part only, if grows immediately out of, XXV, 654.
56	66	though a new contract, XXV, 654.
u	"	cannot recover because not allowed to prove illegal contract, XXV, 654.
66	66	putting up prize packages, XXV, 654.
и	Œ	agent's claim for services in illegal matter, XXV, 654.
"	"	so for money advanced, XXV, 654.
66	66	so for bringing about illegal contract, XXV, 654.
44	66	if any part consideration illegal, entire contract is, XXV, 654.
ĬĹ	"	though some exceptions, XXV, 654.
ee .	u	gave bills for gaming debts, and also for money paid on legal claim, XXV, 654.
u	"	illegal and legal services pleaded so, cannot be separated, XXV, 655.
"	66	mere knowledge by lender illegal use intended, will not
ĸ	66	prevent recovery, XXV, 655.
"		to defeat, must appear lender furnished the money to enable borrower to do the illegal act, XXV, 655.
u	. "	if money lent to enable to do illegal act, failure to so apply it will not purge, XXV, 655.
"		loaned money to enable borrower to leave country, XXV, 655.
"		so purchased goods of one who had committed felony, knowing intended to use money to escape, XXV, 655.
u	u	but see in West Virginia, XXV, 655.
"	u	knowing borrowed for illegal purpose does not pre- vent recovery unless intended should be so used, XXV, 655.
и	u	money lent, not material whether prior contract between lender and another, under which money lent paid to plaintiff as part of consideration, against public policy, XXV, 655.
"	££	note given for substitute in Confederate army paid by
. "	u	surety at principal's request, XXV, 655. if can only recover through medium of illegal agreement, must fail, XXV, 655.
u	66	otherwise if unconnected with such agreement, and founded on distinct collateral consideration, XXV, 655.
. <b>"</b>	u	agent, to illegally sell lottery tickets, conspired with another to falsely claim ticket not sold, had drawn prize and same paid, XXV, 655.
ш	u	void though part performed in favor of party setting up, XXV, 656.
"	66	so though new and legal consideration, if also founded on original illegal contract, XXV, 656.
"	46	seal does not protect from inquiry, XXV, 656.
"	Œ	every new agreement to carry into effect previous illegal agreement invalid, XXV, 656.
tt	66	loaning money, or giving security, to enable to compromise felony, XXV, 656.
66	66	money lent for gaming purposes, XXV, 656.
66	eţ.	so signing note to secure money bet on election, XXV, 656.

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THERS	Agreements	giving money to another to bet on election, which he
		failed to do, XXV, 656.
ű	u	illegal contract executed, and one holds money for use of
u	u	another, may be recovered, XXV, 656.  agent receiving money to transmit on illegal agreement,
"	"	cannot interpose, XXV, 656. otherwise if recovery requires enforcement of unexecuted
		provisions of illegal contract, XXV, 656.
"	u	if shown illegal, and had been executed for pre-existing
"	"	note, cannot recover amount of first note, XXV, 667. how far enforced if to do two acts, one legal and one ille-
		gal, XXV, 657.
u	"	money borrowed to pay taxes to Confederate states, XXV, 657.
u	u	borrowed money to pay debt for bounties to soldiers in Confederate service, XXV, 657.
u	u	claim title through illegal act against one whose title bars
"	"	possession, XXV, 657.  horses drawn at lottery came to possession of A. as agent
		for B.; B. transferred interest to K. who got possession,
44	Œ	and A. brought replevin, XXV, 657. courts will not sit to compel parties to pay wagers, XXV,
u	Œ	657. lotteries prejudicial to public morals, XXV, 657.
u	u	sale lottery tickets, being illegal, renting premises for such
		sale illegal, and rent cannot be recovered, XXV, 657.
u	<b>4</b>	agent to sell tickets sued for money received, XXV, 657.
u	<del>-</del>	money advanced to agent to forward sale of such tickets, XXV, 657.
u	u	check for money lost at faro, XXV, 657.
u	"	if so given, holder must show is bona fide, XXV, 657.
	-	when one betting cannot recover his half because demanded all, XXV, 658.
"	u	winner can only recover own stakes, XXV, 658.
u	"	may recover, though did not forbid delivery, XXV, 658.
_	-	stakeholder gave note for money bet; only bona fide holder can recover thereon, XXV, 658.
u	u	when demand of stakeholder necessary, XXV, 658.
"	ű	lease of premises for bowling alley illegal, XXV, 658.
"	4	building ten pin alley, XXV, 658. broker to aid in violating law, XXV, 658.
66	44	services in illegally selling liquors, XXV, 658.
u	66	lawyer instigated riot agreeing to defend rioters, XXV, 658.
u	u	one engaged in illicit trade detected and gave money to silence person detecting; cannot recover it back, XXV,
	٠ ،	658.
u	u	money advanced to give stocks fictitious value, XXV, 659.
u	4	rent of lodgings to prostitute, XXV, 659.
u	<u>.</u>	so for coach hired to, XXV, 659.
u	"	so for board of, XXV, 659. marriage brokerage contracts, XXV, 659.
u	"	money lent to assumed husband, where person to whom
"	æ	lent knew lender had former husband living, XXV, 659. agreement to procure witnesses to swear to particular facts,
65	es	XXV, 659. note given to bank from which maker had embezzled,
	-	directors agreeing to assist in getting light sentence,
66	u	XXV, 659.
		putting one's property into another's hands to escape draft, XXV, 659.

Hiegality, covenanted to rebuild, city prohibited doing so, XXV, 115-6.

if tenant to rebuild, prohibition no defence to suit, XXV, 116.

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Improvements, when charged to life tenant, XXV, 801. See Heir—Tenants in Common.

Income, when premium on gold part of corpus, XXV. 799. when costs to come out of, XXV, 799.

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Increase, to whom dividends on stock go, XXV, 172.

- to whom profits and surplus, until separated from capital by declara-tion of dividend, XXV, 172.
- increase of capital from surplus, XXV, 172. premium on gold coin part capital, XXV, 172. " u
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- new stock issued after agreement to transfer, XXV, 173.
- " dividend between agreement for sale and time of transfer, XXV, 173.
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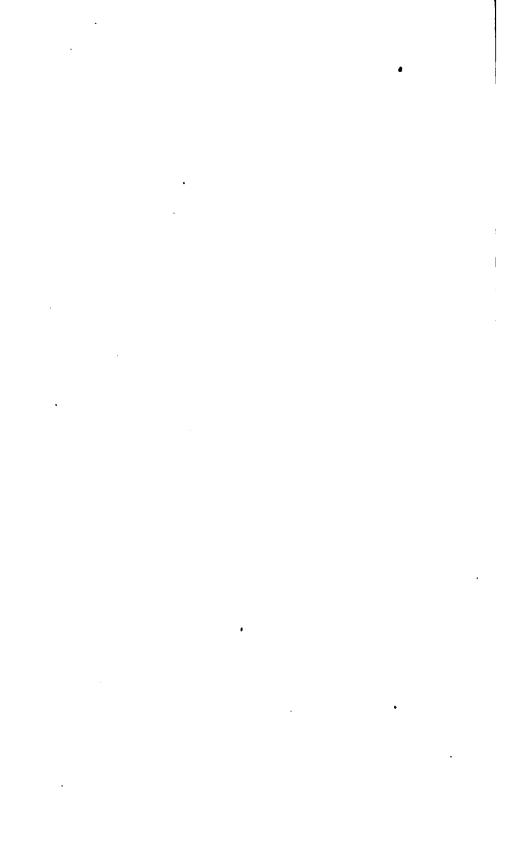
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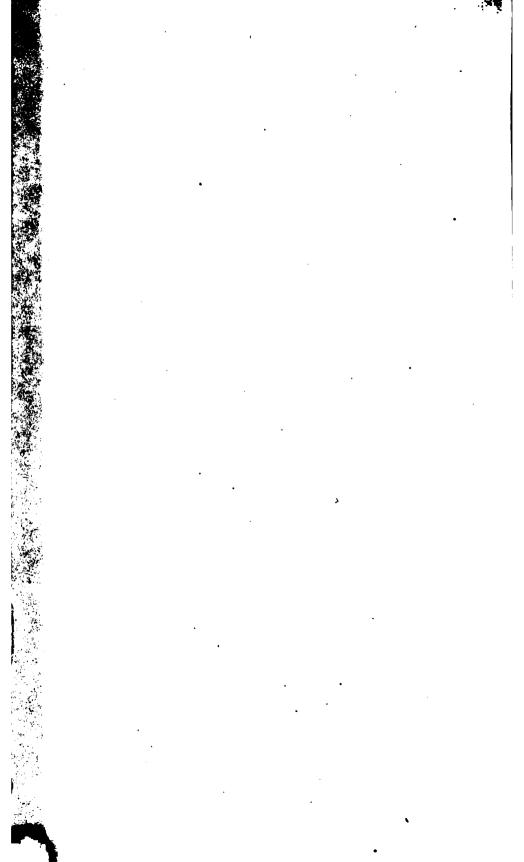
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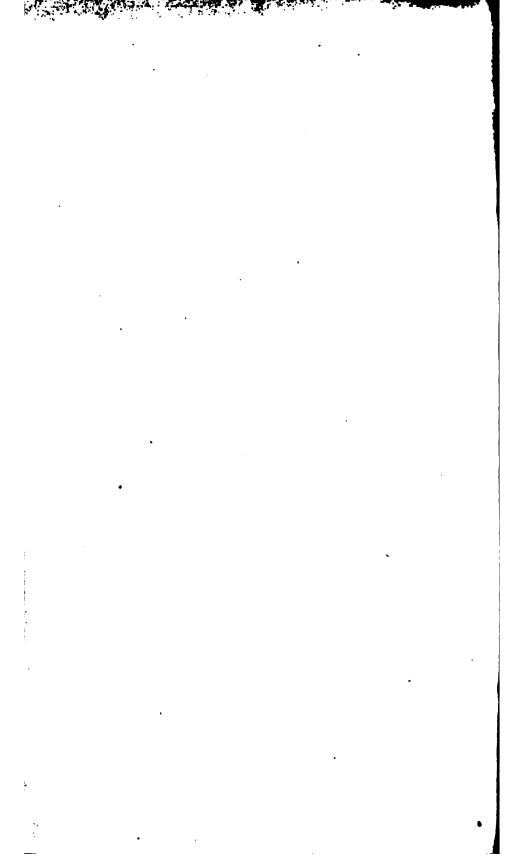
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